

# Global Feedback and Input on the **Facebook Oversight Board** for Content Decisions

## Appendix

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## Draft Charter: An Oversight Board for Content Decisions

Every day, teams at Facebook make difficult decisions about what content should stay up and what should come down.

As our community has grown to more than 2 billion people, we have come to believe that Facebook should not make so many of those decisions on its own — that people should be able to request an appeal of our content decisions to an independent body.

To do that, we are creating an external board. The board will be a body of independent experts who will review Facebook's most challenging content decisions - focusing on important and disputed cases. It will share its decisions transparently and give reasons for them.

The board will be able to reverse Facebook's decisions about whether to allow or remove certain posts on the platform. Facebook will accept and implement the board's decisions.

Facebook takes responsibility for our content decisions, policies and the values we use to make them. The purpose of the board is to provide oversight of how we exercise that responsibility and to make Facebook more accountable.

The following draft raises questions and considerations, while providing a suggested approach that constitutes a model for the board's structure, scope and authority. It is a starting point for discussion on how the board should be designed and formed. What the draft does not do is answer every proposed question completely or finally.

We are actively seeking contributions, opinions and perspectives from around the world on each of the questions outlined below.

## Membership

The board will be made of experts with experience in content, privacy, free expression, human rights, journalism, civil rights, safety and other relevant disciplines. The list of members will always be public. The board will be supported by a full-time staff, which will serve the board and ensure that its decisions are implemented. The staff will not form part of the board itself.

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**1 QUESTION**  
What is the right number of members to balance the ability to work as a group with the need to maximize diversity in expertise and background?

### CONSIDERATIONS

A smaller cohort (e.g. 20) would keep membership focused and enhance camaraderie and identity, while a larger cohort (e.g. 100) would allow for greater diversity of perspectives.

### SUGGESTED APPROACH

The board will be made up of a diverse set of up to 40 global experts.

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**2 QUESTION**  
How can the first members of the board be chosen in a way that is transparent and reasonable?

**CONSIDERATIONS**

Initial appointments could be made by a chair or selection committee commissioned by Facebook (rather than by Facebook directly); however, determining that person or committee would also create its own selection challenges.

**SUGGESTED APPROACH**

Facebook will select the first cohort based on a review of qualifications that will be made public. Special consideration will be given to geographic and cultural balance as well as a diversity of backgrounds and perspectives.

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**3 QUESTION**  
How should future selection be made to ensure continued diversity, expertise and independence?

**CONSIDERATIONS**

Future selection should balance the need for the board's independence with the need for a membership that reflects the diversity of the Facebook community. Facebook could nominate members for confirmation by the board by majority vote, the board could recommend candidates to Facebook, or the process could be some combination of practices.

**SUGGESTED APPROACH**

Once launched, the board will be responsible for the future selection of members. Facebook can propose members, but the board must approve them. No board member may be removed by Facebook except if the member has violated the terms of his or her appointment.

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**4 QUESTION**  
What is the optimal term length for members?

**CONSIDERATIONS**

Longer terms would allow members to develop more experience in making decisions on Facebook content, familiarity with Facebook content review and time to contribute to the board. On the other hand, shorter terms would ensure that the board has fresh perspectives in its membership.

**SUGGESTED APPROACH**

Members will serve part-time, for a fixed term of three years. Their terms will be automatically renewable once.

# Independent Review of Content Decisions

The primary function of the board is to review specific decisions we make when enforcing our Community Standards. It will base its decisions on these standards as well as a set of values, which will include concepts like voice, safety, equity, dignity, equality and privacy. Board decisions are binding on the specific content brought for review and could potentially set policy moving forward. The board will not decide cases where reversing Facebook's decision would violate the law. Facebook can incorporate the board's decisions in the policy development process. In addition, Facebook may request policy guidance from the board.

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**5 QUESTION**  
How should requests to the board be surfaced?

## CONSIDERATIONS

Facebook makes millions of decisions every week on what content can or cannot be on the platform. The board can't realistically review every decision that someone disagrees with. Facebook could, for example, institute a public petition mechanism to filter requests for board consideration. Facebook could also surface difficult cases to the board.

## SUGGESTED APPROACH

Questions will be referred to the board by Facebook users who disagree with a decision, as well as by Facebook itself. Facebook will also refer content decisions to the board for consideration when: it considers specific cases that are especially difficult to resolve; it finds that recurring issues have occasioned significant public debate and discussion; or when existing policy and enforcement practices seems to lead to many decisions inconsistent with Facebook's values.

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**6 QUESTION**  
How should the board select specific cases for consideration from the requests it receives?

## CONSIDERATIONS

Separating the members that choose and decide cases may help ensure decisions are not predetermined while still allowing the board to select its own cases. Another approach is to convene the full board periodically to select a docket (or a set of cases to be reviewed within a given time period).

## SUGGESTED APPROACH

Cases will be heard by panels formed from a rotating set of an odd number of members. Panels that have convened to decide cases could, at the conclusion of their session, choose a slate of eligible cases for subsequent panels to decide. A majority of that panel must agree to select a case.

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### QUESTION

How can the board ensure cultural sensitivity while also issuing decisions that will affect 2.3 billion people around the globe?

### CONSIDERATIONS

The board cannot realistically include people from every country, language group and culture. Supplementing member expertise through consultation with geographic and cultural experts would help ensure decisions are fully informed. This is not a perfect solution, and additional approaches to enhance specific expertise may be needed.

### SUGGESTED APPROACH

Like Facebook itself, the board will be able to call upon experts to ensure it has all supplementary linguistic, cultural and sociopolitical expertise necessary to make a decision. Facebook, aided by board staff, will ensure the board has before it all the relevant material that Facebook had when it made its decision. Facebook users and pertinent stakeholders may also submit arguments and material to the panel.

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### QUESTION

How can Facebook ensure the board's independent judgment?

### CONSIDERATIONS

Facebook is committed to protecting the board members so that they can exercise their independent judgment without inappropriate or undue influence from Facebook or any other external sources when reviewing Facebook decisions. Members need to feel both safe and independent from any outside influences — including monetary ones. Facebook will provide resources to fund the board, but it could do so through a separate entity to preserve the members' independence.

### SUGGESTED APPROACH

Because impartiality is paramount, the board will not include current or former employees or contingent workers of Facebook or government officials. Board members' compensation will be standardized, fixed in advance of the term and unchangeable during their time on the board. Board members may not be lobbied or given other incentives to favor anyone whose case is before the board and members must recuse themselves when they have a conflict of interest. While membership of the board will be public to assure transparency, individual members' names will not be associated with particular decisions. Members will commit themselves not to reveal private deliberations except as expressed in official board explanations and decisions.

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### QUESTION

What will ensure the board's commitment to its purpose and values?

### CONSIDERATIONS

Exercising independent judgement while also upholding a set of principles is both possible and necessary. Values would encompass concepts like voice, safety, equity, dignity, equality and privacy. The public legitimacy of the board will grow from the transparent, independent decisions that the board makes.

### SUGGESTED APPROACH

Facebook will publish a final charter, including a set of values, that will serve as the basis for board governance. The charter will specify Facebook's commitments to the board and the board's authority. Board members will agree to the values outlined in the charter and state the board's commitment to the people who use Facebook.

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### QUESTION

What's the right level of transparency to give the public insight into the Board's thinking while still protecting the safety and privacy of users and board members?

### CONSIDERATIONS

The outcome of any board decision needs to be public, while protecting user privacy. However, the content that the board decides should not be on Facebook should not receive wider distribution. Separately, some decisions, which may be contentious or controversial, could involve security concerns for board members, and their privacy and security must also be considered.

### SUGGESTED APPROACH

The panel's decisions will be made public with all appropriate privacy protections for users. The board will have two weeks to issue an explanation for each decision. Explanations will be issued on behalf of the board and will not be attributed to individual panel members. Should a panel decision not be unanimous, a member who is in the minority may include his or her perspective as part of the explanation shared.

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### QUESTION

How should the board ensure coherence, as decisions from different cases and panels could result in inconsistent conclusions?

### CONSIDERATIONS

Facebook is ultimately responsible for making decisions related to policy, operations and enforcement. At the same time, some mechanism may be developed whereby the full board or a dedicated panel convenes to review case decisions that implicate different policies to ensure consistency of enforcement.

### SUGGESTED APPROACH

Each panel that decides cases will ensure consistency with other issued opinions before finalizing their decision. Other board members will also have the opportunity to review the panel's decision to ensure consistency and coherence.

We look forward to feedback on the questions raised, so we can incorporate the most promising ideas into the final charter.

## Jointly prepared report on public consultation by Baker McKenzie and Facebook's Research Team focused on integrity issues



Oversight Board Public Consultation  
Baker McKenzie  
Qualitative Overview  
June 17, 2019

The purpose of this report is to provide Facebook with an overview of the public feedback collected from the essay portion of the Public Consultation, which solicited feedback on key issues relating to the Oversight Board's membership, decision-making process, and administration & support.

This report complements the quantitative analysis which Facebook conducted on the answers collected from the short-form portion of the Consultation, set out below. Facebook received 1,206 responses to the short form portion of the Consultation and approximately 177 responses to the essay portion of the Consultation (consisting of 341 individual essays). 52 respondents provided consent to share their essay answers publicly. These have been submitted to Facebook under separate cover for inclusion in its report summarizing feedback from both in-person workshops and online consultation.

Facebook intends for the Oversight Board to consider content from across the globe, so it was fitting that input was received in the Consultation collected came from at least 19 countries across six continents. Approximately 90% of essay respondents submitted answers in English, but responses were also received in Arabic, Portuguese, French, German, Italian and Spanish.

All essays received in the Consultation were analyzed for the extent to which they (1) engaged with Facebook's proposal on a range of topics and subtopics within each essay category; (2) expressed sentiment towards Facebook's proposal (i.e., whether the commenter provided critical, neutral or supportive feedback); and (3) set out alternative proposals or other recommendations.

Overall, as indicated by the following chart, respondents were mostly either neutral or supportive towards Facebook's proposals for the Oversight Board, in roughly equal measure, and were more generally supportive than they were critical:



Oversight Board Public Consultation  
Facebook Community Integrity Research  
Quantitative Results  
May 31, 2019

| TRACK                       | TOPIC                                                                                                                                       | CRITICAL | NETURAL | SUPPORTIVE |
|-----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|----------|---------|------------|
| Decisions                   | Criteria and process for case selection                                                                                                     | 7        | 84      | 60         |
|                             | The Board's process and basis for decision-making                                                                                           | 8        | 57      | 47         |
|                             | The role for precedent and influence on Facebook's rules and policies                                                                       | 12       | 39      | 41         |
| Governance / Administration | Board's administration, potentially by an independent body; e.g., a non-profit organization, industry association, think tank or university | 20       | 19      | 32         |
|                             | Relationship between Facebook and the Board                                                                                                 | 3        | 23      | 19         |
|                             | Reporting from the Board                                                                                                                    | 7        | 71      | 56         |
| Membership                  | Appropriate criteria for membership                                                                                                         | 26       | 61      | 56         |
|                             | Conditions for termination                                                                                                                  | 3        | 64      | 46         |
|                             | Selection process (both initial and future)                                                                                                 | 15       | 59      | 60         |
|                             | Terms of agreement for Board members                                                                                                        | 6        | 48      | 37         |

## Methodology

A survey was programmed into 13 languages and distributed to the public via *Qualtrics*. Responses were gathered from April 1 to May 27, 2019.

**The 13 programmed languages include the following:**

1. En/En-GB (English)
2. ES/ES-ES (Castilian Spanish)
3. PT/PT-BR (Brazilian Portuguese)
4. ID (Malay)
5. AR (Arabic)
6. FR/FR-CA (French)
7. TH (Thai)
8. DE (German)
9. IT (Italian)
10. JA (Japanese)
11. KO (Korean)
12. MY (Burmese)
13. UR (Urdu)



### The survey contained questions about the following topics:

1. Board Membership
2. Decision-Making
3. Governance
4. Demographic factors

### The survey included:

- 15 Board Membership questions, including 8 dependent questions
- 9 Decision-Making questions, with 1 dependent question
- 10 Governance questions, including 4 dependent questions
- 3 essays – one for each topic above
- 11 demographic questions, including 2 dependent questions
- This means there were between 33 and 64 questions
  - 33 without dependent questions
  - 48 including dependent questions
  - 64 including dependent questions and questions with multi-choice sub-questions

## Demographics

### The final sample size included 1206 individuals who answered at least one question, the majority of which were English speaking.

- A third of respondents (29%) divulged their country of origin.
- The majority of those who did divulge were from the USA and Canada.
- Only 10% shared on behalf of an organization.

| LANGUAGE             | n    | %      |
|----------------------|------|--------|
| English              | 1078 | 89.39% |
| Spanish              | 37   | 3.07%  |
| French               | 30   | 2.49%  |
| Brazilian Portuguese | 20   | 1.66%  |
| Italian              | 19   | 1.58%  |
| Bahasa Indonesia     | 7    | 0.58%  |
| German               | 7    | 0.58%  |
| Arabic               | 3    | 0.25%  |

|           |      |         |
|-----------|------|---------|
| Thai      | 3    | 0.25%   |
| Korean    | 1    | 0.08%   |
| Portugese | 1    | 0.08%   |
| Total     | 1206 | 100.00% |

|                                                                                            | n   | % TOTAL SAMPLE | % SAMPLE THAT ANSWERED THE QUESTION |
|--------------------------------------------------------------------------------------------|-----|----------------|-------------------------------------|
| NORAM: USA, Canada                                                                         | 189 | 15.67%         | 53.54%                              |
| LATAM: Latin American countries                                                            | 18  | 1.49%          | 5.10%                               |
| EMEA: Europe, Middle East, Africa                                                          | 99  | 8.21%          | 28.05%                              |
| APAC: (Not including Middle East)<br>Countries in Asia, Southeast Asia,<br>Pacific Islands | 47  | 3.90%          | 13.31%                              |
| Total                                                                                      | 353 | 29.27%         | 100.00%                             |

| ARE YOU SHARING YOUR PERSPECTIVES ON BEHALF OF AN ORGANIZATION? |        |     |
|-----------------------------------------------------------------|--------|-----|
|                                                                 | %      | n   |
| Yes                                                             | 9.68%  | 42  |
| No                                                              | 90.32% | 392 |
| NET                                                             | 100%   | 434 |
| Column n                                                        | 434    |     |

| YOU RESPONDED THAT YOU ARE SHARING YOUR PERSPECTIVES ON BEHALF OF AN ORGANIZATION. WHICH OF THE FOLLOWING CATEGORIES DESCRIBES THE ORGANIZATION? |        |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------|--------|----|
|                                                                                                                                                  | %      | n  |
| University                                                                                                                                       | 10.81% | 4  |
| Privacy or digital rights organization                                                                                                           | 10.81% | 4  |
| Government                                                                                                                                       | 5.41%  | 2  |
| Think tank                                                                                                                                       | 16.22% | 6  |
| News or media company                                                                                                                            | 13.51% | 5  |
| None of the above                                                                                                                                | 43.24% | 16 |
| NET                                                                                                                                              | 100%   | 37 |
| Column n                                                                                                                                         | 37     |    |

## Board Membership

- *Number of Members*
- A third of respondents (34%) stated the Board should be comprised of 21-40 members, while a quarter (25%) stated 20 or fewer members.

| IN YOUR OPINION, WHAT IS THE TOTAL NUMBER OF MEMBERS THE BOARD SHOULD HAVE? |        |     |
|-----------------------------------------------------------------------------|--------|-----|
|                                                                             | %      | n   |
| 20 or fewer                                                                 | 25.19% | 204 |
| Between 21 and 40                                                           | 34.07% | 276 |
| Between 41 and 60                                                           | 17.53% | 142 |
| Between 61 and 80                                                           | 6.91%  | 56  |
| More than 80                                                                | 16.30% | 132 |
| NET                                                                         | 100%   | 810 |
| Column n                                                                    | 810    |     |

- *Qualifications of Members*
- When weighing how important the listed backgrounds and qualifications were when considering individual Board members, the majority of respondents suggested that they were all extremely important except educational background which they considered quite important. However, the largest percentage of respondents (63%) stated Cultural and Linguistic knowledge as **extremely important**.

**The majority of respondents suggested each of the following qualifications were either *extremely* or *quite* important:**

- 89% - Cultural and Linguistic knowledge
- 87% - Familiarity with social media
- 65% - Professional background
- 62% - Educational background

| WHEN SELECTING INDIVIDUAL BOARD MEMBERS, HOW IMPORTANT ARE EACH OF THE FOLLOWING QUALIFICATIONS? |                     |                 |                    |                      |      |
|--------------------------------------------------------------------------------------------------|---------------------|-----------------|--------------------|----------------------|------|
|                                                                                                  | Extremely important | Quite important | Somewhat important | Not at all important | NET  |
| Professional background                                                                          | 33.33%              | 31.76%          | 27.03%             | 7.87%                | 100% |
|                                                                                                  | 254                 | 242             | 206                | 60                   | 762  |
| Educational background                                                                           | 29.79%              | 32.02%          | 30.05%             | 8.14%                | 100% |
|                                                                                                  | 227                 | 244             | 229                | 62                   | 762  |

|                                   |        |        |        |       |      |
|-----------------------------------|--------|--------|--------|-------|------|
| Cultural and linguistic knowledge | 62.99% | 26.25% | 8.92%  | 1.84% | 100% |
|                                   | 480    | 200    | 68     | 14    | 762  |
| Familiarity with social media     | 57.98% | 28.93% | 10.34% | 2.75% | 100% |
|                                   | 443    | 221    | 79     | 21    | 764  |

- When considering the Board as a whole, respondents prioritized the following as extremely important: cultural and linguistic knowledge (59%), ideological or political views (48%), and race or ethnicity (48%).

**The majority of respondents suggested each of the following qualifications were either *extremely* or *quite* important, with the exception of income level, for which the majority considered it less important.**

- 87% - Cultural and linguistic knowledge
- 73% - Ideological or political views
- 70% - Race or ethnicity
- 68% - Professional background
- 68% - Other characteristics (e.g., gender, sexuality)
- 67% - Nationality
- 65% - Educational background
- 61% - Religious views
- 46% - Income level

| WHEN SELECTING INDIVIDUAL BOARD MEMBERS, HOW IMPORTANT ARE EACH OF THE FOLLOWING QUALIFICATIONS? |                     |                 |                    |                      |      |
|--------------------------------------------------------------------------------------------------|---------------------|-----------------|--------------------|----------------------|------|
|                                                                                                  | Extremely important | Quite important | Somewhat important | Not at all important | NET  |
| Professional background                                                                          | 35.65%              | 31.89%          | 26.04%             | 6.41%                | 100% |
|                                                                                                  | 256                 | 229             | 187                | 46                   | 718  |
| Educational background                                                                           | 33.47%              | 31.93%          | 27.03%             | 7.56%                | 100% |
|                                                                                                  | 239                 | 228             | 193                | 54                   | 714  |
| Cultural and linguistic knowledge                                                                | 59.22%              | 27.37%          | 10.61%             | 2.79%                | 100% |
|                                                                                                  | 424                 | 196             | 76                 | 20                   | 716  |
| Ideological or political views                                                                   | 48.25%              | 24.90%          | 17.62%             | 9.23%                | 100% |
|                                                                                                  | 345                 | 178             | 126                | 66                   | 715  |

|                                                 |        |        |        |        |      |
|-------------------------------------------------|--------|--------|--------|--------|------|
| Nationality                                     | 39.47% | 27.62% | 19.80% | 13.11% | 100% |
|                                                 | 283    | 198    | 142    | 94     | 717  |
| Race or ethnicity                               | 47.84% | 22.18% | 15.76% | 14.23% | 100% |
|                                                 | 343    | 159    | 113    | 102    | 717  |
| Other characteristics (e.g., gender, sexuality) | 41.20% | 26.54% | 15.08% | 17.18% | 100% |
|                                                 | 295    | 190    | 108    | 123    | 716  |
| Income level                                    | 26.99% | 19.30% | 26.85% | 26.85% | 100% |
|                                                 | 193    | 138    | 192    | 192    | 715  |
| Religious views                                 | 36.21% | 25.21% | 22.70% | 15.88% | 100% |
|                                                 | 260    | 181    | 163    | 114    | 718  |

- *Nominating and Selecting Members*

## Nomination

- Half of respondents believe the public (51%) or non-governmental organizations and academics (46%) should nominate future Board members.
- 38% believe existing Board members should nominate future members
- 29% believe Facebook should do the nominating

| ONCE THE BOARD IS ESTABLISHED, WHO SHOULD NOMINATE FUTURE MEMBERS TO THE BOARD? |        |     |
|---------------------------------------------------------------------------------|--------|-----|
|                                                                                 | %      | n   |
| Facebook                                                                        | 28.83% | 205 |
| The public                                                                      | 50.77% | 361 |
| Existing Board members                                                          | 37.55% | 267 |
| Non-governmental organizations and academics                                    | 46.27% | 329 |
| Other (Please specify on the next page)                                         | 12.24% | 87  |
| NET                                                                             | 100%   | 711 |
| Column n                                                                        | 711    |     |

- 6.14% of the total population shared ideas about who else might nominate future members of the Board in the follow-up question when the ‘other’ option was chosen from the above list.
- 29 out of 74 (39% of the 6% who responded) respondents suggested a combination of entities.
- Other suggestions included:
  - Facebook Advisors (8 respondents)
  - Facebooks users and/or stockholders (6)
  - Elected Official/Government (6)
  - Governing bodies such as the FTC, FCC, UN (3)
  - 5 respondents suggested establishing an application/selection process.

## SELECTION

- Responses as to who should select future Board members did not present one distinct option over the others but were closely spread over all options, with a slight preference for either the public or non-governmental organizations and academics (both at 42%).

| ONCE THE BOARD IS ESTABLISHED, WHO SHOULD NOMINATE FUTURE MEMBERS TO THE BOARD? |        |     |
|---------------------------------------------------------------------------------|--------|-----|
|                                                                                 | %      | n   |
| Facebook                                                                        | 30.27% | 211 |
| The public                                                                      | 42.04% | 293 |
| Existing Board members                                                          | 42.04% | 293 |
| Non-governmental organizations and academics                                    | 35.72% | 249 |
| Other (Please specify on the next page)                                         | 7.60%  | 53  |
| NET                                                                             | 100%   | 697 |
| Column n                                                                        | 697    |     |

- 3.9% of the total population shared ideas about who else might select future Board members in the follow-up question.
- 22 out of 45 respondents (48% of the 3.9% who responded) again stated a combination of parties, that comprise a committee, should be involved in the selection process.
- Other recommendations included:
  - Facebook users and/or stockholders (4 respondents)
  - Neutral 3rd party (5)
  - Elected officials (2)
  - Christian pastor (1)

- Advertisers (1)
- Journalists (1)
- Responses as to **who should not be allowed to serve on the Board** did not present one distinct option over the others but were closely spread over the options, with a slight preference for not allowing lobbyists (72%) and those financially invested in Facebook (69%) to serve.

| IN YOUR OPINION, WHICH OF THE FOLLOWING GROUPS OF PEOPLE SHOULD NOT BE ALLOWED TO SERVE ON THE BOARD? |        |     |
|-------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                       | %      | n   |
| Current government officials                                                                          | 63.17% | 434 |
| People who are financially invested in Facebook                                                       | 69.00% | 474 |
| Lobbyists in a related industry                                                                       | 72.20% | 496 |
| Other (Please specify on the next page)                                                               | 17.61% | 121 |
| Nothing should automatically disqualify a candidate                                                   | 11.64% | 80  |
| NET                                                                                                   | 100%   | 687 |
| Column n                                                                                              | 687    |     |

- In the follow-up question, 9.62% (116) of all respondents shared additional thoughts about other groups that should not serve on the Board in the follow-up question.
- Groups that were mentioned included those with:
  - 34.4% (40/116) - Extreme ideologies – racial, religious, political and/or those who incite violence, recognized terrorist groups
  - 28.4% (33/116) - Political / Governmental agenda, bias, power
  - 15% (17/116) - History of criminal convictions
  - 13% (15/116) – Ties to Facebook or influence within Facebook (financial, governance, leadership)
  - 9% (11/116) – Financial conflicts of interest
- Respondents also mentioned:
  - Advertisers
  - Those who have violated Facebook Community Standards
  - Law enforcement
  - Other social media companies
  - Celebrities/Those with strong social media presence

- As can be seen in the table below, about a third of respondents (31%) stated cultural or linguistic knowledge should be considered when selecting panel members, while about a quarter (26%) stated panel members should be randomly selected.
- Less important overall were professional or educational backgrounds, ideological or political views, and geographic location.

| IN YOUR OPINION, WHICH OF THE FOLLOWING CONSIDERATIONS IS MOST IMPORTANT WHEN SELECTING PANEL MEMBERS? |        |     |
|--------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                        | %      | n   |
| Professional or educational background                                                                 | 17.36% | 117 |
| Geographic location                                                                                    | 7.57%  | 51  |
| Cultural or linguistic knowledge                                                                       | 30.56% | 206 |
| Ideological or political views                                                                         | 11.87% | 80  |
| Panel members should be randomly selected                                                              | 26.11% | 176 |
| Other (Please specify on the next page)                                                                | 6.53%  | 44  |
| NET                                                                                                    | 100%   | 674 |
| Column n                                                                                               | 674    |     |

- When asked to prioritize diversity and situational relevance, respondents **prioritized relevance** for:
  - professional or educational background (60%)
  - geographic location (71%)
  - cultural or linguistic knowledge (55%)
- But respondents **prioritized diversity** for:
  - ideological or political views (69%)

| YOU RESPONDED THAT IT IS MOST IMPORTANT FOR THE BOARD TO CONSIDER ...                                                                                                               |                |                 |      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-----------------|------|
|                                                                                                                                                                                     | Highly diverse | Highly relevant | NET  |
| ...professional or educational background when selecting panel members.                                                                                                             |                |                 |      |
| In your opinion, is it more important that panel members have professional or educational backgrounds that are diverse from one another, or that are relevant to a particular case? | 40.17%         | 59.83%          | 100% |
|                                                                                                                                                                                     | 47             | 70              | 117  |



|                                                                                                                                                                            |        |        |      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|--------|------|
| ...geographic location when selecting panel members.                                                                                                                       |        |        |      |
| In your opinion, is it more important that panel members come from geographic locations that are diverse from one another, or that are relevant to a particular case?      | 28.57% | 71.43% | 100% |
|                                                                                                                                                                            | 14     | 35     | 49   |
| ...cultural or linguistic knowledge when selecting panel members.                                                                                                          |        |        |      |
| In your opinion, is it more important that panel members have cultural or linguistic knowledge that is diverse from one another, or that is relevant to a particular case? | 44.66% | 55.34% | 100% |
|                                                                                                                                                                            | 92     | 114    | 206  |
| ...ideological or political views when selecting panel members.                                                                                                            |        |        |      |
| In your opinion, is it more important that panel members have ideological or political views that are diverse from one another, or that are relevant to a particular case? | 68.75% | 31.25% | 100% |
|                                                                                                                                                                            | 55     | 25     | 80   |

- 33% of all respondents shared other considerations for selecting members in the follow-up question.
- 27% (11 out of 40 respondents) suggested the selection of panel members should be based on the issue or topic in question.
- Other recommendations included assuring Board members are:
  - Diverse (across cultures, genders, sexual orientation, race, ethnicity, and ideology)
  - Skilled (analytical, legal expertise, human rights knowledge)
  - Impartial

# Decision-Making

## Consultation

- The majority (95%) suggested the Board should be allowed to recommend changes to Facebook rules and policies; a majority (67%) also suggested the Board should be able to group related cases into a single review.

|                                                                                    | Yes    | No     | NET  |
|------------------------------------------------------------------------------------|--------|--------|------|
| Should the Board be allowed to recommend changes to Facebook's rules and policies? | 95.05% | 4.95%  | 100% |
|                                                                                    | 633    | 33     | 666  |
| Should the Board be able to group related cases into a single review?              | 66.72% | 33.28% | 100% |
|                                                                                    | 443    | 221    | 664  |

- Respondents were split across research assistants (63%) and non-governmental organizations (68%), with a preference for subject matter experts (77%) regarding which types of experts the Board should be able to consult.

| OF THE FOLLOWING TYPES OF EXPERTS, WHO SHOULD BOARD MEMBERS BE ABLE TO CONSULT? |        |     |
|---------------------------------------------------------------------------------|--------|-----|
|                                                                                 | %      | n   |
| Research assistants supporting the Board                                        | 63.17% | 410 |
| Individual subject matter experts                                               | 77.04% | 500 |
| Non-governmental organizations, think tanks, and universities                   | 68.72% | 446 |
| Other (Please specify on the next page)                                         | 12.63% | 82  |
| No one; Board members should not consult with experts                           | 5.86%  | 38  |
| NET                                                                             | 100%   | 649 |
| Column n                                                                        | 649    |     |

- 6.6% of the total population shared examples of other types of experts the Board may consult in the follow-up question.

### Respondents stated the following could be consulted:

- Those affected/victims or advocates of those affected (16 respondents)
- Experts in the specific field or topic of the content in question (15)
- Attorneys/Legal experts (8)
- Lawmakers/Government (6)

- Journalists (6)
- Cultural/Linguistic representatives (3)
- Experts in the following areas
  - Human rights (2)
  - Civil Rights (1)
  - Privacy (1)
  - Constitutional knowledge, Free Speech (3)
  - Academia – Historians, Scientists, Writers (6)
- Religious Leaders (3)
- Activists (3)

## Considering Opinions

- The majority of respondents (94%) stated the Board should be allowed to read written submissions of opinion provided by certain people, groups or industries.
- Respondents were split regarding whose opinions should be considered with a slight preference for people who posted or shared the content (80%).

| OF THE FOLLOWING, WHOSE WRITTEN OPINIONS SHOULD THE BOARD BE ABLE TO CONSIDER? | %       | n   |
|--------------------------------------------------------------------------------|---------|-----|
| The people who posted or shared the content                                    | 80.81%  | 480 |
| The people who reported the content                                            | 77.61%  | 461 |
| The people identified or mentioned in the content                              | 75.42%  | 448 |
| Concerned individuals and organizations                                        | 64.14%  | 381 |
| Other (Please specify on the next page)                                        | 5.72%   | 34  |
| NET                                                                            | 100.00% | 594 |
| Column n                                                                       | 594     |     |

- 2.5% of the total population shared examples of other opinions the Board should consider and no clear preference surfaced in the follow-up question.
- Recommendations included:
  - Those impacted by the content in question (7 respondents)
  - Those who posted the content in question (3)
  - Legal Experts (3)

- Journalists/Media (3)
- 3rd Party Experts (3)
- The public at large (3)
- Content Moderators/Decision-Makers (2)

## Considering Past Decisions

- The majority of respondents (65%) stated that considering past decisions is extremely to quite important, while almost a third (28%) consider past decisions as somewhat important.

| HOW IMPORTANT IS IT THAT THE BOARD TAKE ITS PAST DECISIONS INTO CONSIDERATION? |        |     |
|--------------------------------------------------------------------------------|--------|-----|
|                                                                                | %      | n   |
| Extremely important                                                            | 24.09% | 153 |
| Quite important                                                                | 41.73% | 265 |
| Somewhat important                                                             | 27.56% | 175 |
| Not at all important                                                           | 6.61%  | 42  |
| NET                                                                            | 100%   | 635 |
| Column n                                                                       | 635    |     |
| Column n                                                                       | 649    |     |

## Prioritization of Quality vs. Quantity

- The majority of respondents (76%) stated that dedicating more time and research to each case is more important than making more decisions each year.

|                                              | %      | n   |
|----------------------------------------------|--------|-----|
| Dedicate more time and research to each case | 75.64% | 475 |
| Make more decisions each year                | 24.36% | 153 |
| NET                                          | 100%   | 628 |
| Column n                                     | 628    |     |

# Governance

## Length of Tenure

- A quarter of respondents (26%) suggested a 3-year tenure would be best, while (19%) of respondents suggested 2, 4, or 5-year tenures should be considered.

| IN YOUR OPINION, WHAT IS THE MAXIMUM NUMBER OF YEARS A MEMBER SHOULD BE ABLE TO SERVE ON THE BOARD? PLEASE SELECT A NUMBER BETWEEN 1 AND 10 IN THE BOX BELOW. |        |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                                                                               | %      | n   |
| 1                                                                                                                                                             | 4.65%  | 29  |
| 2                                                                                                                                                             | 18.78% | 117 |
| 3                                                                                                                                                             | 26.00% | 162 |
| 4                                                                                                                                                             | 18.62% | 116 |
| 5                                                                                                                                                             | 18.46% | 115 |
| 6                                                                                                                                                             | 4.65%  | 29  |
| 7                                                                                                                                                             | 1.61%  | 10  |
| 8                                                                                                                                                             | 1.77%  | 11  |
| 9                                                                                                                                                             | 0.64%  | 4   |
| 10                                                                                                                                                            | 4.82%  | 30  |
| NET                                                                                                                                                           | 100%   | 623 |

## Reporting

- Half of respondents (49.5%) believed reviewing a minimum number of cases each year to be extremely or quite important.
- The majority of respondents found the other methods as extremely or quite important.
  - 92.9% - Publicly explain the reasoning behind each decision
  - 87.9% - Publish regular reports about trends and findings
  - 85.6% - Publicly disclose Board members' potential conflicts of interest
  - 80.0% - Choose cases that will have the greatest public impact
  - 9.5% - Review a minimum number of user cases each year

|                                                                  | Extremely useful | Quite useful | Somewhat useful | Not at all useful |
|------------------------------------------------------------------|------------------|--------------|-----------------|-------------------|
| Review a minimum number of user cases each year                  | 22.51%           | 27.01%       | 38.91%          | 11.58%            |
|                                                                  | 140              | 168          | 242             | 72                |
| Publicly explain the reasoning behind each decision              | 76.12%           | 16.83%       | 5.13%           | 1.92%             |
|                                                                  | 475              | 105          | 32              | 12                |
| Publish regular reports about trends and findings                | 63.67%           | 24.28%       | 10.45%          | 1.61%             |
|                                                                  | 396              | 151          | 65              | 10                |
| Choose cases that will have the greatest public impact           | 46.33%           | 33.71%       | 14.38%          | 5.59%             |
|                                                                  | 290              | 211          | 90              | 35                |
| Publicly disclose Board members' potential conflicts of interest | 63.20%           | 22.40%       | 11.04%          | 3.36%             |
|                                                                  | 395              | 140          | 69              | 21                |

- The majority of respondents (94%) suggested the Board should produce broader, publicly accessible reports that summarize the Board's actions and content decisions.
- Half of respondents (49.5%) believed Board reports should be produced every 3 months, while 35% believed every 6 months would suffice.

| SHOULD THE BOARD ALSO PRODUCE BROADER, PUBLICLY ACCESSIBLE REPORTS THAT SUMMARIZE THE BOARD'S ACTIONS AND CONTENT DECISIONS? |        |     |
|------------------------------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                                              | %      | n   |
| Yes                                                                                                                          | 94.10% | 574 |
| No                                                                                                                           | 5.90%  | 36  |
| NET                                                                                                                          | 100%   | 610 |
| Column n                                                                                                                     | 610    |     |

| HOW FREQUENTLY SHOULD THE BOARD PRODUCE THESE REPORTS? |        |     |
|--------------------------------------------------------|--------|-----|
|                                                        | %      | n   |
| Once every 3 months                                    | 49.56% | 283 |
| Once every 6 months                                    | 35.20% | 201 |

|                 |        |     |
|-----------------|--------|-----|
| Once every year | 15.24% | 87  |
| NET             | 100%   | 571 |
| Column n        | 571    |     |

## Board Member Identity

- Respondents were split about publicly disclosing the identity of Board members, with 54% stating identities should be disclosed, and 46% stating identities should not be disclosed.

| IN YOUR OPINION, SHOULD THE IDENTITY OF THOSE PANEL MEMBERS REVIEWING INDIVIDUAL CASES BE PUBLICLY DISCLOSED? |        |     |
|---------------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                               | %      | n   |
| Yes                                                                                                           | 53.62% | 333 |
| No                                                                                                            | 46.38% | 288 |
| NET                                                                                                           | 100%   | 621 |
| Column n                                                                                                      | 621    |     |

- 286 of the 333 (85%) in favor of disclosing identities explained their answer in the follow-up
- 260 of the 288 (90%) not in favor of disclosing identities explained their answer in the follow-up

### IN FAVOR

**The majority of those in favor of disclosing Board member identities (40%) cited the need for transparency.**

- Some respondents were specific about the benefits of the transparency. Those cited benefits included:
  - Increasing individual accountability and better understanding about who is making the decisions, how those individuals are motivated, what is guiding their decisions and trends in those decisions over time (30%)
  - Increasing impartiality and fairness as well as reducing conflicts of interest (22%)
- Building trust in Facebook and encouraging integrity of the people and the process. (18%)
- Finally, 3.5% respondents stated that disclosing the identities of Members was important due to the import of the decisions being made as well as the precedent being set by those decisions.

### NOT IN FAVOR

**71% (185 out of 260 respondents) of those NOT in favor of disclosing Board Member identities stated the need for protecting the members.**

- Respondents stated the need to protect members from:
  - Criticism
  - Pressure
  - Harassment
  - Abuse
  - Retaliation
- Respondents also stated it was important to protect members' privacy and security.
- 24% stated that anonymity would increase the likelihood of impartiality and objectivity; members would be less likely to be prone to corruption (approached by others, influenced by others).
- 15% stated the need to focus on the process/the integrity of the process, which made identifying the members and involving the public unnecessary.
- Along these lines, 5 respondents also stated the importance of the Board having a singular voice.

## Supervision of Operations

- Almost half of respondents (41.7%) reported the Board should supervise its own operations, while almost a quarter (23.6%) reported operations should be supervised, administered and supported by a nonprofit or nongovernmental organization.

| IN ADDITION TO THE SUPPORT FACEBOOK WILL PROVIDE, WHO SHOULD SUPERVISE, ADMINISTER, AND SUPPORT THE BOARD'S OPERATIONS? |        |     |
|-------------------------------------------------------------------------------------------------------------------------|--------|-----|
|                                                                                                                         | %      | n   |
| An accredited university                                                                                                | 9.38%  | 57  |
| An industry body or association                                                                                         | 7.40%  | 45  |
| A nonprofit or nongovernmental organization                                                                             | 23.68% | 144 |
| The Board itself, as its own entity                                                                                     | 41.78% | 254 |
| Other (Please specify on the next page)                                                                                 | 9.70%  | 59  |
| None of the above                                                                                                       | 8.06%  | 49  |
| NET                                                                                                                     | 100%   | 608 |
| Column n                                                                                                                | 608    |     |

**3% of the total population shared examples of the kinds of industries or associations that should supervise, administer, and support the Board's operations in the follow-up question.**



## Recommendations included

- Subject Matter Experts/Industry Specialists (4 respondents)
  - Social Media Industry Representatives/Technology experts (9)
  - Security experts (1)
  - Free Speech/Constitutional Law experts (3)
- Independent/ 3rd Parties (7)
- State Regulators (1)
- FCC/Ads Standards Authority (2)
- Universities (1)
- Non-governmental Agencies (1)

## 5% of the total population shared examples of who else should supervise, administer, and support the Board's operations in the follow-up question.

- Most of these respondents (16 out of 58 respondents) suggested a combination of entities should support Board operations.
- Other recommendations included:
  - Facebook itself (6)
  - United Nations (4)
  - Facebook users (3)
  - General Regulators (3)
  - FTC (2)
- 8 of these respondents suggested assuring an independent, consistent director and staff are in place

## APPENDIX C

# Compilation of all public consultation essays from respondents who agreed to have their essays shared publicly.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_10PMFMy8hg2rbLW                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Nils Parker                                    | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The focus on diversity and a subject matter expertise across a broad range of topics is laudable and necessary. The people involved in making decisions on content that may affected 2 billion users kind of need to know their stuff. That said, none of that will ensure that this board is a success. To increase the likelihood of success, there should be a real focus on selecting people who possess empathy, and a sense of humor, and an understanding of sarcasm (so basically, no Germans), and some kind of history of, or connection to, actually producing or disseminating content for widespread consumption. Culturally, we are in the mess we are in because our tech institutions have selected away from the kind of empathy that produces benefit of the doubt and actual social connection. I mean, look at this current tech bubble. It's defined by a bunch of "social" tech designed so you can live your entire life without having to take care of anything or fucking talk to anybody. Uber? Instacart? Postmates? Birds? Lime? Take me. Give me. Bring me. I'll just drop this scooter anywhere. How can we expect when our expression runs afoul of somebody else's sensibilities that they will assume that our intentions were benign, when the way we engage with our technology is, if not naturally malignant, at least completely asocial? To combat that, I think you have to comb through the ranks of these various fields from which you pluck candidates and, once you've verified their bona fides, make the most important determination of all: is this person a humorless prick who I want to push in front of a train, OR are they a reasonably caring and generous person who I'd have a three-hour dinner with and let watch my dog for a weekend? For example: if I were selecting from a pool of journalists on the left, I'd pick Rachel Maddow not Maggie Haberman. On the right, I'd pick Chris Wallace not Brit Hume. Because honestly, who wants to share a bottomless basket of breadsticks at the Garden with Brit Hume? I bet even his family is like "ya no, we'll Postmates it." My point is, an oversight board only works if it is populated by human beings who don't actually hate other human beings; who instead have the skillset to contextualize and then categorize poor judgment, bad jokes, sarcasm, stupidity, self-interest, creative expression, ideology and on the far end, malevolence. They have to be able to recognize what EXACTLY they are looking at, what EXACTLY it was intended to convey and produce, and, in evaluating the response to the content that got it in front of the oversight board to begin with, to what extent is this issue a meaningfully triggering event and to what extent does it involve a butthurt millennial who doesn't think they should have to see things they don't like while they eat the Almond Butter & Preserves sandwich with the crusts cut off.

# Decisions

## ESSAY TEXT

The Board's deliberation process should be private. You need to give those people an opportunity to ask stupid questions and push their fellow board members to explain things that, to this point, we have taken for granted if only because we're afraid to question the logic of those things. As for the board's process and basis for decision-making, my hope would be that it is guided by common sense and the common good. If it takes 20 pages to describe how the board came to a decision about whether to keep down or put back up a post about something that does not involve national security, intellectual property, or casual use of the word "literally" in conversation, it would be abundantly clear to me that the board has lost the thread. Or that they never had their arms around the core issue to begin with. That said, common sense determinations can be difficult if users and the general public are given broadly-constructed means to request review of particular content decisions, because the general public is stupid. There must be some sort of mechanism or process to trigger or request review, that much is clear, but it feels like it would be much more efficient if there was a way to monitor response to decisions about takedowns (i.e. dozens of mirror sites/posts appearing within 36hrs) as a way to trigger review. It's like that Neil Gaiman line: when people tell you there is something wrong with your writing, they're usually right. But when they tell you how to fix it, they are ALWAYS wrong. You will know THAT something is wrong by all the commotion around a particular decision. You will not know WHAT to do about it if you are to judge by the opinions of the creators of that commotion. Because they are hopeless. After all, they're losing their shit over a Facebook post. Their life went wrong many, many turns before they came to this fork in the road.

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# Governance

## ESSAY TEXT

Periodic, public reports from the Board are going to be critical; not just to show the public that work is being done, but to give them data to work with to determine for themselves if this feels like a reasonably worthwhile endeavor that should be supported. There is additional value in these reports as well, inasmuch as there is a degree of objective self-reflection that might occur when, as a civilization we look at the cases the Oversight Board adjudicated and we are forced to ask ourselves WTF are we doing with our lives? This is why people journal. To get all those crazy thoughts out of their head and trapped inside the four edges of a sheet of paper so they can engage with the idea using their rational brain. This is what a robust series of quarterly reports on the work of the Oversight Board might accomplish; hopefully driving down the number of cases over time. (I know how Pollyanna that is, but it's worth pursuing). I wonder if there's a way to create an ad program that kicks off money that goes into a fund used to operate the Oversight Board. Like what if publishers of content can have some sort of Oversight Board certification, or have their Oversight Board record published, and the publishers with good records drive a higher CPM, and some portion of that ad revenue rolls into an account that runs the board, since the board is responsible for the value that has accrued to that publisher's account now. Some organic way to fund the Oversight Board feels like it will produce the best result with respect to how the public views it. Like, it can't be administered by the EFF or funded by all these different foundations or nonprofits. It's just too convoluted. That same kind of mindset should probably go into the communication channels between the board and the FB staff. On the one hand, the findings should be issued by the board, then they should be executed and catalogued by FB staff. But whether those findings result in rules changes, or whether FB staff should be able to affect the deliberations of the board feels not quite right. I think you want to silo the board as much as you can so that the stink of Zuckerberg's horrible judgment and stunning lack of common sense doesn't rub off on the board after he and his team decide not to implement any of the board's recommendations. The board needs to be able to say to the public: 1) here are our DETERMINATIONS. They have been submitted to Facebook and have been followed to a T, the end. and 2) here are our SUGGESTIONS for rule changes that came as a result of the determinations this quarter. I don't think you want any dialogue between the board and FB staff at that point because it pollutes the purity of the board and plants the seed that all of these efforts are a coordinated attack on free speech on Twitter by George Soros and the Three Musketeers of Pizzagate or whoever the fuck are the people who think stupid things because they can't hold competing ideas in their mind at the same time. Let the board issue its DETERMINATIONS and SUGGESTIONS. No communications otherwise.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_10Skcm4pO3nyOhD                              | Malta                                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Christina Athanasiou                           | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The Board should be composed of people that have deep knowledge of the Facebook platform and the ways that Social Media form opinions and create trends. Users tend to share information without researching, demonstrate a neutral attitude towards horrible events (like New Zealand's gun shoot, where nobody reported the live video), become really judgmental on posts that were made cause of bad sense of humor and fail-most of them- to realize that the platform is for expressing opinion, manage to reach a large amount of people when action needs to be taken and discover the world. Facebook is for socializing and not for sentencing other human beings to ridicule, or uncover the dark side of people. Facebook's reason of existence is not to manipulate the masses or bullying and it is not a platform to start a revolution. The truth is that through Facebook, you can increase awareness, you can help, you can support, you can do beautiful and great things for humanity. It is used in the wrong way by people that are genuinely bad and would, for sure, have found another way to express their ignorance or hatred even if Facebook never existed. So the board should be composed by educated people, with acceptance of cultural differences, people that respect humanity, people that can justify their decisions with logical arguments. We need some Socrates, some Plato on the Board. People that have traveled and met all types of human beings. People that understand terms like democracy, fascism, racism, feminism and do not give their own explanation to each term, people that are impartial with a proven track record of the above. If any member of the Board fails within their tenure in office for any reason that could eventually harm the functioning of the Board, they should be relieved from their duties immediately. All members should agree on providing the users of Facebook with an experience that is compliant with the original idea of the Platform: a place where you can socialize in a civilized manner with your fellow humans, express freely your opinions and ideas, discover wonderful things that happen at the other side of the globe and share your life experiences with friends and relatives.

## Decisions

### ESSAY TEXT

Criteria and process for case selection Cases should be selected based on the credibility of the page - vif the page is a well known media house or a much respected brand. After the page appeals and Facebook still wishes to enforce their decision and another appeal comes through, then the Board should take the case over. Ability for users and/or the public to request review This I believe is an indefeasible right of the user. Even the worst criminals have that right... The role for precedent and influence on Facebook's rules and policies. If there is a similar case in the past with the user and they have already received a notice form the platform, then I believe the Board should not intervene. The Board's process and basis for decision-making This is somewhat difficult for me to elaborate. I hope that the selection of the Board members will ensure that their basis for decision making will be solid The level of transparency in the Board's deliberation and decision-making process I believe in transparency but on a medium level. It is too risky to be fully transparent. Form of case presentation and deliberation Undertaking deliberation with the public must involve a 3 steps process (I read it somewhere): 1. learning about an issue 2. considering and discussing it in depth, and 3. then reaching an informed, considered collective decision or recommendation.

## Governance

### ESSAY TEXT

Source of compensation for the Board and supporting staff I really have no comments on that Board administration, potentially by an independent body; e.g., a non-profit organization, industry association, think tank, or university I would vote for a university and a think tank Transparency in decision making and operation Medium level of transparency for this case also Periodic, public reports from the Board I think every quarter or every 6 months is good Facebook's implementation of Board decisions Facebook should respect the Board's decisions, for sure Communication between Facebook staff and the Board This channel must be clear so that communication flow is continuous and healthy.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_110WxSM3DJeEA53                              | Australia                                                         | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Marc Allgrove                                  | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Decisions

### ESSAY TEXT

Thinking about the Facebook tribunal challenge. Cross border, cross cultural paradigms make the challenge of a collective insurmountable. Think the answer is in it being an independent panel of one, selected upon defined criteria from candidates who have percolated to the top of their relevant profession due to the quality of their achievements and the integrity of their character, rather than their origins or field of expertise. That having been said education would be a priority field of endeavour from which candidates to be selected. The appointment would be for a specified period of time and Facebook would cover the costs of their secondment. Broad parameters of intent (ie moral, education, society etc) would need to be formed and then deferred to the experience of the appointee for implementation . Penalties would need to be clearly defined and not open to interpretation or selective application.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_1C2UT5QTGly5wbV                              | Sweden                                                            | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Mikael Karlsson                                | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Criteria should be based on several key factors such as competence, experience and other commitments. We all have an opinion to express on most matters but in this case it would be fruitful to have a board that actually has experience in dealing with issues, been involved in setting industry standards and have seen the web evolve into what it is today. Being able to see the bigger picture involves not only understanding of people but also of current, past and future technologies. Selection process could be that Facebook interview the person and then already selected board members and finally the board makes the decision. Any board member found not to act in the interest of the board and not being able to commit in full to actually do the needed work should be considered for termination. The boards needs not only thinkers and talkers but also doers. Terms of agreement could be drafted by a third party.

## Decisions

### ESSAY TEXT

Initial case selection should focus on cases that have the most broad impact. For Facebook this means global impact. Users and/or public should be able to request reviews and these should be handled with complete transparency. Maybe a log where interested parties can follow the process. Facebook is a public company and has its first responsibility to its board, shareholders and users. The independent board should be able to submit policies to the company and have a defined process of how these are being handled. There should be a defined and agreed upon timeline and output. The board should have a majority vote where the chairperson has final vote if there is 50/50 and the board has not reached consensus. The board should always be transparent when it comes to how it deliberate and its decision-making process. Notes and documents should be made public in a library/archive. Case presentation and deliberation should be in 3 stages. 1st to the board itself, 2nd to Facebook and 3rd to the public.

## Governance

### ESSAY TEXT

Depending on the workload the board should be compensated for time spent. But the compensation should be balanced so that board members join this effort for the better good and not for the compensation. Board administration could be either by the board itself where Facebook always have veto, or through an independent body. But there should also not be too many layers of administration since this could make processes slow. Full transparency in how the board operates and how decisions are being made. Public statements, logs, library and archive. Every 6 months the board should publish a log of the work currently being undertaken and work already completed. If needed there could be public reports in shorter time intervals but not longer than 6 months. There should be an agreement between Facebook and the board concerning the process for and the time line for implementing Board decisions. If broken there should also be a penalty or a public statement. Communications between staff at Facebook and the Board should be recorded, when possible, and included in the archives.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE    |
|------------------------------------------------|-------------------------------------------------------------------|----------------------|
| R_1C9EI9mVweRuGTt                              | Brazil                                                            | Brazilian Portuguese |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                      |
| Marcio Malmegrin                               | No                                                                |                      |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                      |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                      |

## Membership

### ESSAY TEXT

Board members should be people that are familiar with the dynamics of using social networks and their impact on the various areas of life in society. The purpose of your participation will be to provide a constructive contribution to the discussion of the topics assessed, always supported by facts and studies produced by nationally or internationally recognised entities. Participation must be compensated and periodically assessed by peers, ensuring that discussions are guided by the intellectual honesty and philosophical integrity of members. Members with participation below desirable levels will be replaced at the end of each year, or immediately, in specific cases. Members must sign and comply with NDA's, enforceable anywhere in the world, with a minimum validity of 10 years. Similarly, they must be subject to have their assets audited during the same period.

## Decisions

### ESSAY TEXT

Review of the cases should be scheduled in accordance with the potential impact of the subject discussed on the life of humans, the outcome of elections and business development or agreements. Analysis of cases involving racial hate or among nations, discrimination by race, religion, colour or sexual orientation are maximum priorities. The immediate fulfilment of the decisions will be ensured, as well as their review at the request of interested parties. The precedents should serve as reference for future decisions, without, however, preventing their review as an individual case. In addition, it is critical to take the social, political and geographic context into consideration of each case and the evolution of this context over time.

## Governance

### ESSAY TEXT

The board should be administered by an NGO, whose resources will be provided by an investment fund (Trust), with funding originating from Facebook itself. Facebook will only abide by the Board decisions, without any interference in its management or on its decisions.



| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_1CDRr99va0lkXzR                              | Canada                                                            | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Stewart Foss                                   | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Members should be able to demonstrate the ability to think critically and evaluate diverse opinions with minimal bias. They should have the ability to be convinced to adopt a new opinion based on new information. The public should not select the membership, but they should be able to make recommendations. You don't want this to be a popularity contest for ideologues. Board members should be forced to resign or be terminated when there is a clear conflict of interest.

## Decisions

### ESSAY TEXT

This becomes a quasi-judicial body without borders. Priority should be given to cases where precedent can be applied to many cases and have a significant impact. The board decisions should impact policy and application of policy for Facebook or any other organization that opts to use the board. Precedent is important, but shouldn't be unchangeable with a legitimate new cause, this industry is rapidly changing and there should be flexibility to reverse precedent when the need arises. There should be very high levels of transparency into what informed a decision or transparency into what informed a decision.

## Governance

### ESSAY TEXT

The board should run independently of Facebook. It should be administered by a non-profit organization. There should be a single point of contact between the board and Facebook. No individual board members should direct Facebook employees. Facebook should be bound to implement recommendations from the Board.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_1GkKASU2qA4UKhb                              | Egypt                                                             | Arabic            |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| أحمد خير                                       | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The membership selection criteria must, particularly for the first Board, be public, transparent and ensure wide diversity in members' cultural and professional backgrounds and level of expertise. An adequate explanation of each criterion and of the percentage of Board members representing it must be published. Board membership must be as large as possible. Public servants cannot serve as members on the first Board, and the criteria for selecting them must be left up to the agreement to be prepared by the first Board. After the first Board is established, one half of the membership would be regularly renewed.

## Decisions

### ESSAY TEXT

It is important to ensure that parties to problems have more than one level for the submission of grievances when the decision pertains to a post, the re-publication of a post, or comments regarding the same, and that there are at least four levels for grievances when Facebook's decision includes final closure of user accounts. Facebook would publish a special report about the Board decisions that it has complied with, those it has not complied with, and the reason for non-compliance. Facebook would announce the decisions made regarding any of its employees, or the employees of the partner companies or agent, in order to perform its work if they fail to implement the Board's compulsory decisions. Conduct an annual review of the Board's decisions as compared to the "community standards" in order to develop criteria.

## Governance

### ESSAY TEXT

Establish an endowment whose revenues ensure sufficient resources for the Board, and have it managed by an independent committee. Publish periodic reports covering the shortest time range possible. Define criteria for the type of Board decisions that are binding on Facebook and the decisions that are non-binding. Establish a non-profit organization whose members are the Board members. These members' working memberships would end with the end of their Board membership, provided that membership continues, if they wish it to, without the right to vote on the Board's decisions, in order to ensure that the expertise of the individuals whose membership has ended continues within the organization.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_1Gv8PTFGxj4krRP                              | United Kingdom of Great Britain and Northern Ireland                 | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Governance

### ESSAY TEXT

Facebook should fund the operation of the Board. Decisions should be binding on Facebook, including the financial provision to enact the decisions fully. The Board should have the ability to report publicly on compliance by Facebook with its recommendations.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_1IK78msm7aq0EhD                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Kevin Wei                                      | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Appropriate criterion for membership should include: 1. Professional expertise: as mentioned in the prompt, experts with experience in content and relevant disciplines should be considered. Professional expertise adds to credibility of the Board. 2. Diversity: in race, age, religion, educational background, sexuality and gender identification, (dis)ability, military service, ethnicity, nationality, expertise, and other factors. Diversity adds to credibility of the Board. Diversity also ensures that any specific panel will not fall victim to groupthink and will consider multiple perspectives. 3. Ability to impartially and knowledgeably decide any case in question Selection process: the board should be large enough to accommodate selection of panels such that each individual member of the Board only serves on  $\times 50\%$  of panels per year. The Board should have a MIXED selection process; i.e. there should be fixed allocations governing how members of the Board are selected. One potential allocation could be 1/3 elected by Facebook users (the Public), 1/3 selected by Facebook and/or industry organizations, and 1/3 selected by a committee comprised of non-profit/non-governmental institutions, governmental institutions, and academia. Selection of panels should be random, and panel composition should be anonymous. Conditions for termination should also include conditions for disqualification from membership, including: 1. Acceptance of employment with a job description that includes use of Facebook's platform and/or competing platforms (e.g. social media coordinator, paid ads director, CEO of Twitter, etc.) 2. Launching a campaign for public office or acceptance of employment in government (including military, UN, World Bank, EU, etc.) 3. Membership in the clergy of a religious institution (e.g. priest, nun, monk, etc.) 4. Past involvement with conspiracy theory groups, including but not limited to: flat earth, anti-vaccination, George W. Bush Ohio-fraud, birtherism, Q-anon, Pizzagate, Sandy Hook/gun violence denial, chemtrails, etc. 5. Past involvement with a racial/gender supremacy, caste supremacy, terrorist, violent nationalist, or other discriminatory movements including KKK, white nationalism/supremacy, men's rights activists, Khmer Rouge, violent Marxism, political extremism, anti-Semitism, etc. 6. Past close involvement or close ties to figures who have, are running for public office, government officials, or senior government officials (e.g. close ties to military junta, family members of the Saudi royal family, Chiefs-of-Staffs to cabinet-level officials in the U.S., campaign manager in a U.S. Congressional race, etc.) Terms of agreement for board members should include: 1. Agreement not to engage in the disqualifying activities described above in 1-6 2. Agreement to voluntarily disclose and submit for review (either by Facebook or by an independent panel such as the non-profit/government/academia panel described in the selection process above) any real or perceived conflicts of interest 3. Agreement to be impartial and decide cases to the best of their abilities 4. Agreement to not financially profit (either directly or indirectly) from membership on the Board 5. Agreement to keep confidential the deliberation process for any particular case, as well as membership on any specific panel (this clause may potentially expire after a set amount of time or after the member's term expires).

# Decisions

## ESSAY TEXT

Criteria and process for case selection: there should be multiple processes for selection 1. Referral from Facebook and/or a committee comprised of non-profit/non-governmental institutions, governmental institutions, and academia 2. Selection by members of the Board without referral, potentially by either a fixed or randomly-selected (fixed-size) subcommittee of members of the Board 3. The public should not have the ability to select cases for Board review. Any public process is likely to be subject to widespread media or misinformation campaigns, and publicly-selected cases have higher potential to have lower social impact, lower relevance, etc. 4. Criteria for case selection: cases should be selected that are controversial, have high social impact, culturally relevant or manifest cultural clash/differences. Cases should also be selected if previous Board decisions on certain topics have been reversed or are contradictory. Cases should not be selected if a similar or highly relevant case is already under review. Selection should include batches of cases as well as individual cases. Cases should be selected where applications of existing Facebook policy are confused, contradictory, or controversial. Ability for users and/or the public to request review: 1. All users should have the ability to request review, maybe with specific non-appealable carveouts for specific policy violations. Ability to request review preserves belief in the integrity of the process. 2. Any stakeholder in a Board decision should have the option of appealing the decision of the Board. There should be a subcommittee on the Board responsible for reviewing such appeals. Any appeal that such a subcommittee decides to take up should be referred to a randomly-selected panel of members of the size  $2n - 1$  where  $n$  is the size of the original panel (i.e. if the original panel is 3 members, the appeals panel should be 5 members; if the original panel is 15 members, the appeals panel should be 29 members; etc.). This preserves belief in the integrity of the process and allows the Board to reverse its decisions. The role for precedent and influence on Facebook's rules and policies: see below. Board decisions should be treated as binding on Facebook, not as mere recommendations. However, the Board should also have the ability to recommend policy changes to Facebook, which should be treated as recommendations and not as binding. Implementation of Board decisions: decisions of the Board should result in revisions to Facebook's internal content moderation rules and regulations. Facebook's content moderation rules and regulations should be made public. The Board should not be responsible for implementing its decisions, but it should retain the right to conduct reviews of Facebook's internal content moderation team to determine the level of compliance with its decisions. The Board's process and basis for decision-making: 1. Board decisions should be clarifications or implementations of existing Facebook policy, which we understand to be written unilaterally by Facebook 2. In cases where no existing Facebook policies apply, the Board should have the option of making no decision (or making the decision that no existing policy applies) 3. In all cases, the Board should retain the right to recommend policy changes to Facebook The level of transparency in the Board's deliberation and decision-making process: 1. All case results should be publicly released, including details of specific cases (with personally identifiable information redacted) 2. Specific details of the deliberation process should not be released 3. Specific panel members on cases should not be released.

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# Governance

## ESSAY TEXT

Source of compensation for the Board and supporting staff: upon establishment of the board, Facebook should provide an endowment to the organization which administers the Board. The endowment should be used to compensate the Board and supporting staff. Facebook should then commit to periodic provisions to the endowment of the Board. This structure will contribute to the independence of the Board. Since Facebook and the industry will be the main beneficiaries of Board decisions, Facebook and/or industry should fund the Board. Membership on the Board should be part-time, OR full-time. Board administration, potentially by an independent body; e.g. a non-profit organization, industry association, think tank, or university: under no circumstances should the board be administered by Facebook or any industry association. The Board should be administered either by an accredited university, or a non-profit association (excluding think tanks). Universities are preferred as they generally have no partisan affiliations and will be perceived as neutral. Transparency in decision making and operation: decision making and operation should be mostly transparent. Periodic, public reports from the Board: all case decisions and policy recommendations from the Board should be public. Facebook and/or the Board should establish a standardized report format for periodic release to the public. Facebook's implementation of Board decisions: see previous response. Board decisions should be taken as binding and as interpretations of existing Facebook policy. The Board should have the ability to recommend policy changes to Facebook content moderation policy. Communication between Facebook staff and the Board: in order to maintain the independence of the Board, Facebook should designate a fixed number of liaisons to the Board. All other Facebook staff should be prohibited with communicating to the Board in any capacity.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_1isdBhXPS64XnNH                              | Costa Rica                                                           | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

Board should not preempt national rules on privacy and content. So great care has to be exercised not to replace or influence local courts and its procedures. Membership should be based on common sense, public interest and knowledge of the impact of Social media, instead of legal background.

## Decisions

### ESSAY TEXT

Board decisions should be based on the best rationale possible. Boards internal deliberations should remain secret and only level of consensus should be reported.

## Governance

### ESSAY TEXT

Compensation should come from all social media platforms that want to be under the Boards oversight. Board Administration should be under an independent body that spreads the costs over the participating social media outlets, and expenses shared based on their income. Rationale for Board decisions is the strongest transparency possible. Leave internal deliberations closed and private. Facebook may present its own implementation rationale.

| RESPONSE ID                                                                              | COUNTRY                                                                                  | ORIGINAL LANGUAGE |
|------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|-------------------|
| R_1JRRkRCOmIWUOa6                                                                        | Not provided                                                                             | English           |
| RESPONDENT NAME                                                                          | RESPONSE ON BEHALF OF ORGANIZATION                                                       |                   |
| University of Oklahoma College of Law's Center for International Business & Human Rights | Yes                                                                                      |                   |
| ORGANIZATION TYPE                                                                        | ORGANIZATION NAME                                                                        |                   |
| Think tank                                                                               | University of Oklahoma College of Law's Center for International Business & Human Rights |                   |
| CONSENT TO SHARE                                                                         | CONSENT TO ATTRIBUTE                                                                     |                   |
| Yes, my essay responses may be shared publicly                                           | Yes, my name and/or organization may be attributed to my response                        |                   |

## Decisions

### ESSAY TEXT

Background: We appreciate the opportunity to submit preliminary reactions on the Oversight Board's "process and basis for decision-making." We are the Center for International Business & Human Rights at the University of Oklahoma College of Law. Our mission is to provide: (1) training to students as well as the greater legal community and others in international business & human rights (IBHR) standards and (2) academic think tank support on IBHR issues. International IBHR Standards: In 2013, the U.S. Government provided guidance to U.S. companies, stating they should treat the UN Guiding Principles on Business & Human Rights (UNGPs) as a floor rather than a ceiling in their operations. (See <https://perma.cc/47NJ-BC4A>; <https://bit.ly/2Bva4uB>.) The U.S. Government also promotes implementation of the OECD Guidelines for Multinational Corporations (OECD). (See <https://perma.cc/V37Z-5L4T>; <https://bit.ly/1kPDOqW>.) Both frameworks provide that companies should "avoid infringing on the human rights of others" and "address adverse human rights impacts with which they are involved." (UNGPs Principle 11; OECD Chp. IV, p. 31.) Both also state the human rights standards to be applied are "international" standards, such as the International Covenant on Civil and Political Rights (ICCPR). (UNGPs Principle 12; OECD Chp. IV, p. 31.) International Protections for Expression: ICCPR Article 19 provides the right to seek and receive information of all kinds, regardless of frontiers, and through any media, but permits speech limitations if a three prong test is met. To be valid, speech restrictions must be: (1) "provided by law" (i.e., properly promulgated/provide appropriate notice) and (2) "necessary" (i.e., the speech restriction must, among other things, be the least intrusive means of achieving governmental purposes) (3) to achieve an enumerated legitimate public interest goal (e.g., protection of the rights of others, national security, public order, public health or morals). Mandatory bans on speech in Art. 20, e.g., for incitement to violence, are also subject to Article 19's tripartite test. (See UN Human Rights Committee General Comment 34, 50, <https://bit.ly/2Qe9G9A>, hereinafter GC 34.) Given corporate content moderation necessarily impacts the right to freedom of expression, Facebook should take proactive measures to avoid infringing on this right in order to live up to contemporary IBHR standards. This means Facebook's Community Standards as well as the Board's basis for decision-making should align with ICCPR Article 19. The UN's human rights machinery has provided substantial guidance on the scope of Article 19. (See, e.g., GC 34; reports of the UN Special Rapporteur on Freedom of Expression: <https://bit.ly/2T791vq>.) International – Not Regional – Human Rights Standards: It is important to note that the UN's international human rights standards on speech differ from various regional human rights norms. For example, the UN Human Rights Committee, which recommends interpretations of the ICCPR, has spoken out against blasphemy bans and laws that prohibit the denial of historic atrocities. (See GC 34, 48, 49.) In contrast, the European Court of Human Rights, a regional court that provides binding interpretations of the European Convention on Human Rights, has upheld blasphemy bans and prohibitions on the denial of historic atrocities. In implementing the contemporary IBHR expectations set forth in the UNGPs and OECD Guidelines, it is essential that Facebook and its Oversight Board align with international standards (i.e., the ICCPR) on freedom of expression rather than various regional standards, which may depart from the international protections. Implications: Grounding corporate speech codes and the Oversight Board's adjudicative approach in contemporary IBHR standards is a foundational matter that has implications for the more detailed questions in your

questionnaire. For example, it is essential that Board members have expertise in international human rights law. Also, Board decisions should be published and a procedure for “amicus briefs” should be provided. Benefits: Potential benefits of aligning the Community Standards and the Board’s approach with ICCPR Art. 19 include providing Facebook with a principled global standard in its content moderation and strengthening the company’s ability to resist governmental pressure to remove speech in ways that depart from ICCPR Art. 19. Further Information: More details about the information provided above can be found in our Director’s recent article: E. Aswad, The Future of Freedom of Expression Online, 17 Duke L. & Tech. Review 26 (2018) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3250950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250950)), which is incorporated by reference into this submission, and calls for further multi-stakeholder deliberations to deal with some tricky issues relating to how to apply ICCPR Art. 19’s tripartite test in the corporate context.



| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_1mhjNimCLYKjJ2A                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

For experience of Board members, I believe it is feasible to include representatives from global business and even governments of governmental organizations. Since their role is to help navigate content decisions, their recommendations may ultimately affect business decisions. Also, I believe there is an opportunity to forge links with public officials or public safety authorities and include them in the dialogue. I believe the first slate of members should be proposed by Facebook but with a consultative element. Propose a slate of candidates while soliciting more suggestions from the public. Create the final roster that merges these inputs with an eye toward diversity and representation. Members should also be demonstrable leaders - either thought leaders or leaders of organizations and groups - so that they are seen as influential and can help shape opinion. I think there should be some standard wording for termination based on negligence, malfeasance, lack of work or conflicts of interest. Members should be limited to two 4-year terms. I would need to study other such bodies to come up with ideas for terms of agreement.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_1ptb5s6UIFjUuJy                              |                                                                   | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Hong Kong Unison                               | Yes                                                               |                   |
| ORGANIZATION TYPE                              | ORGANIZATION NAME                                                 |                   |
| None of the above                              | Hong Kong Unison                                                  |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Decisions

### ESSAY TEXT

As mentioned above, criteria, process, rules and policies of complaint, escalation, Board should be made transparent to the public. It is not necessary to reveal details of each case. Decision- making process and deliberation is adequate as too much details may lead to further conflicts and arguments.

## Governance

### ESSAY TEXT

Members of the Board should not be compensated financially. They are expected to be “volunteer” panel members with no monetary remuneration. After setting up of the Board, procedures of complaint and escalation should be made clear and widely available to the public; as well as how the Board supports decision making after escalation.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_1q1Y9WEE3VVZq9v                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

We need to ensure that money cannot creep into the selection process. No lobbies, special interests and politics. That includes churches and peddlers of unsubstantiated cures, products and theories. People with extreme views or beliefs in nonsensical and non-scientific frameworks, such as flat Earth, anti-vaccers, religions, etc. should be excluded. Selection process, present candidates with a set of cases with known desired results. Test them to see if they match the expected results by some percentile. Terminate if there is any collusion or bribery found. Terms: the work should be for the benefit of humanity. Perhaps a set of fundamental principles should be set out that should be followed. No prejudice No harm No rights of one human to supercede the rights of another. No political content (this alone would solve most of the problems facing Facebook and the countries of the world. We have run that experiment long enough and the misuse and advise of the platform for political gain is just too easy and plainly evident. Get back to roots of social interaction, dump all political content. No political movement should ever have a social media budget, clearly that indicates abuse of the platform and your customers).

## Decisions

### ESSAY TEXT

Allow people to appeal a decision, perhaps some threshold like n people have to appeal a case to get it to the board. All appeals have to be verified to be from real people. Randomly selected cases. Forget trying to maintain consistency with precedents. Too difficult to select the prior cases, and you don't want the trap of precedents preventing changes over time and better decisions. Board should see technical info about the quantity and type of posts made by the poster of the case in question. Do they keep posting the same stuff? Is their IP address suspect? Etc. Where did groans come from? Are they coming from professional shops that are getting paid to generate propaganda? Transparency should be limited to who is on the board. Publication of actual deliberations and results should be limited to a category of infraction. Eg "suggesting violence", "political".

## Governance

### ESSAY TEXT

Pay a budget to the institution running the board. Then step back. Institute should probably their budget. Publish who the members are. Replace posts that are rejected by the board with a marker stating what categories were violated. Mark posts or pages that were accepted by the board with a badge indicating it was reviewed. Once the board makes a decision, the item in question should be removed or marked automatically and right away without any fb staff involvement at case granularity. Fb to provide a very secure API or interface of items to be reviewed and handled after review. Criteria and community rules to be published and reviewed too.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3mwaHQ2uxnuIR2N                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Robert                                         | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

There should be members that are from all social circles that includes the left, right, liberal and even alt-right. Facebooks recent decision to ban “white focused groups” was incorrect and one sided.. for example I have seen groups that are specifically targeted to only black people and do not allow non blacks in.

## Decisions

### ESSAY TEXT

Facebook should be an open forum where all walks of life can have a click or group they feel comfortable in.. it would not be fair for Facebook to police groups based on there own prejudices or dislike of a groups political or racial feelings.

## Governance

### ESSAY TEXT

No lobby or outside influences should tarnish the board.. if any board member is found to being bribed or coerced he should be immediately removed from the board. Board members should be paid a livable wage based on the locale.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3nNx3mWW0befRDH                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Ethan Winters                                  | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Appropriate criteria for membership: I would like to first state the importance of a completely diverse board, as most of the content issues I have researched and read about are related to specific “tribes” of people. These tribes could be tied together by race (in the case of BlackMattersUS), gender, religious belief, political ideology (often the target of Russian programming), or really anything else. I will explain the notion of a diverse board further in the next section, but I also think it is important to point out a few baseline criteria for being member of the Oversight Board. First, I believe it is important that all members receive some sort of GED equivalent degree. To my understanding, anyone who wants to form valid opinions on controversial topics needs to be able to formulate their argument, have some basic understanding of US/World history, as well as a basic understanding of modern science - all come with the equivalent of a High School level degree. Second, I think that all board members should understand how social media works, both in terms of daily usage and the psychological effect that social media use has. This is important because, first off, if one doesn't actually use Facebook or understand how the platform works, how are they going to be able to make judgement calls on controversial content? The psychology piece is important to understand so when judging content, members can extrapolate the viewing of it to real world effects. Selection process: As mentioned above, members should be selected based on the minimum criteria, in addition to the additional insights they can add surrounding the most content-producing and controversial “tribes” on the Facebook platform. The way that the board would achieve these insights in diversity. For example, I would assume that political beliefs cause a lot of questionable content to surface on Facebook, often under the Integrity and Authenticity section of the community standards. Having a small number of left leaning, right leaning, and moderate members of the board allows additional insight into controversial content, which in turn will lead to a more comprehensive discussion of whether or not the post needs to be removed or not. This example of politically motivated posts applies to all of these tribes on Facebook, and having representatives from the most common ones that are brought to the board will allow more comprehensive discussions and more efficient verdicts. Conditions for termination: If a board member is using the board for personal gain (removing any posts they don't like), this should be brought up to the staff, which will look at evidence and make a decision. Additionally, if a board members is rude, uses hate speech, or makes blatantly poor decisions, this should be brought up to the staff. Terms of agreement for Board members: 1. Respect other board members’ opinions 2. Don't discuss the case with outsiders until the case has been closed 3. Use your expertise on a topic to make a decision, not your emotional connection to the topic.

## Decisions

### ESSAY TEXT

Criteria and process for case selection: I believe each case should be provided a group of both board members that have both expertise on the case topic and randomly selected board members. As mentioned in the previous section, the level of diversity will allow for an impactful group of board members to take a case relating to their expertise in a certain “tribe”. The randomly selected members will keep any polarization in the case from occurring. Ability for users and/or the public to request review: Users should be able to read the review once the decision has been made and the

case has been closed. A report should be written including board member identities and the final decision along with reasoning presented in the discussion of the case. Implementation of Board decisions: There can be three outcomes, as I see it. The first is that the content in question is deemed appropriate, and the poster and those involved are notified that the post they were involved in was looked at by the board and ruled to comply with Facebook's standards. The second outcome is that the content is deemed questionable, meaning it can't be taken down but is concerning. Again, all parties involved in the post are notified that it was looked at and will stay up, but are also told that this serves as a warning to posting content similar to the post in question. The board will then decide if the questionable content should dictate a new rule in the standards. The last outcome is that the post is removed, and all parties are notified why, and given the report to read. The Board's process and basis for decision-making: The board will discuss the case until a 3/4 consensus is reached. The level of transparency in the Board's deliberation and decision-making process: All reports of the case should be made public for anyone to read - whether it is a removed post or a post ruled to be ok, people have the right to read the discussions the board is having about their content, and the content that they see on a daily basis.

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## Governance

### ESSAY TEXT

Source of compensation for the Board and supporting staff: I think that making such important decisions is enough compensation in itself. The term should be short enough that a board member doesn't have to commit too much uncompensated time but the decisions being made by this board might even make headlines, so that is enough incentive to give each case the time to be fair and logical in my opinion. Periodic, public reports from the Board: Every 6 months should suffice. All rulings should have a published report as well. Communication between Facebook staff and the Board: Should be seamless. The staff oversees the board making sure they are being fair and no board members is violating the agreement.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_24hHyFvTARlOb9w                              | Australia                                                         | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Annie                                          | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Since Facebook is made up of public users it is important that they are part of setting the criteria and selection process. The latter two are internal functions of the board. Criteria for membership should include users or representatives of users who can speak about the accessibility, privacy etc that affect users on the platform. It should reflect the global reach of Facebook and reflect different cultures and religions and age distribution and of course women. Having a public choice opportunity to vote for board members is the least Facebook can do given it makes its money on users stories and content.

## Decisions

### ESSAY TEXT

Criteria - offensive, divisive or vilifying content to gender, sexuality, religion or culture Precedent is not ok in the context of tech - Christchurch set a new precedent so if we were looking in the past we would maybe not see the severity of the present ? Users and public should be able to request reviews

## Governance

### ESSAY TEXT

NFP should form governance of board. Must be transparency in decision making

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_24IUzKA0kReqzaB                              | Australia                                                         | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Carol Pryle                                    | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Decisions

### ESSAY TEXT

I think it's most important that Users can report/request a piece of content for review. Reviews are selected from viral content and also reported content. Board decisions and are made public in brief and in detail. Panel members making content decisions are named, but membership is a 2-year term to lessen stress on members. But membership could be renewed. Content decisions in brief should be shown to content sharers.



| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_2c2cmFJrEuAX3Bl                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

There should be no criteria for membership; in order to accurately reflect the users of the community, it should be drawn from the community as a whole. The fear of regulatory capture from interested parties, whether they are politically left, right, up, or down; is something that must be kept in mind. I'm assuming the purpose of this board is to provide some new level of liability protection for Facebook, as well as stem the tide of dissent from people who are now all of a sudden mad about Facebook even though nothing is drastically new. As a result, no matter what composition the board gets made out of, people will remain angry and likely stay angry for the foreseeable future. As such, my suggestions on the board is more to have it appears as a great democratizing force, while remaining relatively powerless and unable to effectively complete the desired targeted information. Although this might go counter to the stated intent, the implicit intent of such a development seems to be to protect the interests of Facebook. Developing this closer to an advisory panel might be the best way forward.

## Decisions

### ESSAY TEXT

The cases should be randomly selected out of reports of users, with the caveat being that if multiple people report the same content, it would only count as one total report against something. This would ensure that the content that is reviewed is reviewed from a wide swathe of content -- not just something a loud group of people want the issue pressed on. Users should be able to request review through the use of the pre-existing report button. Precedent should be maintained, but only at the en-banc level. An en-banc panel needed to reverse any decisions put in place by smaller panels, if 40% of the overall board votes to re-hear the issue. The precedent should not impact Facebook's rules or policies, but if it is desired to be implemented, it should be put to a shareholder's vote in an amended package. Board decisions should be implemented rarely, and only with the overwhelming support of the Facebook shareholders and/or internal policymakers. The board's deliberation should be streamed live, and full transparency must be in effect. There should be no set form of case presentation and deliberation. Any person on the panels, at any time, can be unilaterally terminated by Facebook if the individual states anything that can be registered as (1) inflammatory, (2) derogatory, or (3) negative to the actual or perceived values of Facebook and it's share value.

## Governance

### ESSAY TEXT

The board should be governed with transparency, but also with a level of hostility towards the board. It should be assumed that the board is making decisions that run counter to the economic values of Facebook and the fiduciary duties owed to its shareholders. The Board's administration should realistically be held by either an internal source at Facebook, or through a panel of multiple representatives. I would suggest a random community college or trade school as well, since you want an organization that does not have a prestige or financial interest in the board's operations. The board should be well compensated, to the equivalent of a senior software engineer at silicon valley rates. The main reason for this is to create an incentive to remain on the board and act in a way that benefits the board instead of personal opinions and beliefs. If anyone at any time suggests they want to work on the board, their application file should be marked with a "do not allow on the board" designation. There is too much potential for negative outcomes based on individual desires for power. Facebook should implement the Board's decisions either never, or after a period of time in which the issue can be further discussed and the inevitable media flurry has died down.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2c5jgWiNGvQh12W                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Ronald Davenport, Jr.                          | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The broadest criteria should be used for membership. The selection process should be open, transparent and consistent. Member should be terminated if they receive payment from outside actors as part of any lobbying efforts. Members should have 3 year staggered terms.

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## Decisions

### ESSAY TEXT

Criteria for case selection should be public outrage and request from Facebook management. Precedent is important for consistency, but not determinative to give room for adaptability to changing circumstances, standards and mores. Board decisions should be implemented by majority vote. The board should publish its decisions and reasoning.

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## Governance

### ESSAY TEXT

The board should be generously compensated so as to avoid lobbying efforts from potential outside influencers. The board should be administered by an outside independent third party organization. Board decisions should be transparent and reported on a quarterly basis. Facebook management should work closely with the board regarding implementation.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2cirF9UteAutdD0                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Richard Schmidt                                | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

As I mentioned before, a good variety of experience & education is always beneficial to any board. So 'appropriate criteria' would include those qualities. Your selection process should be done by those with knowledge of the goals and direction of Facebook; then, be open to the suggestions and opinions of potential and actual board members. Board members should be terminated only for cause; criteria for which should be established right in the beginning (your expectations for each member re: involvement and attendance, and of course avoidance of outside conflicts). If/when they arise, procedure for dealing with the situation will be in place and understood by all affected. I believe board member terms of agreement should be a simple majority vote (aye or nay), unless a special issue calls for full majority acceptance (rare). Use Robert's Rules of Order; though old school, they're so popular because they're quite effective.

## Decisions

### ESSAY TEXT

I think case selection will initially be driven by popular concern. They could be brought to the board by FB or board members, and a simple vote taken to choose and prioritize which should be worked on. Obviously, parameters of time and discussion scope should be established beforehand, to facilitate the process and keep things moving along. Thereafter future issues can be tailored around what has already been dealt with and resolved. Review requests (at least initially) should be postponed so the board has an opportunity to establish a rhythm and pace for productively resolving matters at hand without unnecessary interruption. If the Board is to be effective, its decisions and suggestions must be considered by FB to determine whether they should be implemented and/or influence rules & policy. I believe that should be established right away, by FB re: how much board feedback and work will impact FB rules and policy. Implementation of board decisions should be a given - otherwise, why even have one? There should be some check and balance on how much influence the board will have, but ultimately the board should act in an advisory position, and as a very pragmatic window onto Society, helping to indicate the direction Facebook should take. I assume there will be some a chairperson, chosen by the board members, who directs the agenda. Meetings will probably be by conference call/video, with one or two annual meetings held on either coast attended by board members who can make it (should be a requirement that they attend at least one, financially facilitated by FB).

## Governance

### ESSAY TEXT

FB, or a nonprofit established between the board and FB, should be the source of compensation. Compensation and the source thereof is always slightly problematic. To avoid allegations of influencing decisions, consider making the board membership volunteer and non-compensatory, but fully reimburse any and all expenses of board members. Alternatively, set the compensation per year at a minimal amount (\$200,000?) with full board expenses reimbursement. Quarterly reports and reasonable transparency of board activity should be readily supported and made available for public review. Board meetings could be streamed, but I wouldn't recommend it. Better to provide a synopsis of the meetings along with the initial proposed agenda and ultimate actions of the board thereafter; the board must have the autonomy to address issues and to get things done in a reasonably comfortable fashion.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2cjTTfZH1jwuymc                              | Australia                                                         | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Sandra Wallace                                 | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

It's important to have diverse persons, educated and experienced in social media.

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## Decisions

### ESSAY TEXT

Cases that would engender a huge public outcry. Put process in place for users and public to voice their opinions/complaints . Precedent is important but but each case needs individual assessment. Implementation should be majority rule. Time to study review and board consultation to ascertain all have done so. Process should involve much of the above mentioned. Originating request as it stands then case study with time given to investigate with agreement by all that they are ready to debate towards deliberation. All members must signal they have had enough time and are ready. If one member is not then the rest of the board needs to wait until all are ready.

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## Governance

### ESSAY TEXT

Source of compensation should come from more than one source to forestall bias. Administration by an experience body, namely University, non profit organisation. Definitely transparency, with published workings and decisions. Three monthly reports to Facebook and administrating body. Facebook to implement boards decisions. If they don't this should be explained in full and made public. 24/7 communication between Facebook and the board should be open at all times.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2TNrGiwis8PgWJk                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Stephen Bolin                                  | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

What matters to me most is a diversity of opinion and thought, and a commitment to free speech. The Reverend Martin Luther King, Jr. dreamed of a time when we would judge people not based on the color of their skin but by the content of their character. Someone's race or ethnicity or gender mean nothing to me. Pick people with a diversity of opinion. See the recent YouTube video with the founder of twitter and their censor. Note how Twitter was utterly surprised that their policy's actually discriminated against conservatives when it comes to the transgender issue. Don't be surprised. Every controversial decision will be by definition controversial. Your best hope is to be transparent and to publish even the minority's decision on the issue.

## Decisions

### ESSAY TEXT

What's most important to me is free expression. You have a history of showing people what they want based off of user preferences. There is no reason why people should not be able to voice unpopular opinions and what some may consider hate speech. No one should be forced to see what they don't want to on Facebook. That's why they can follow who they want and block who they want. Don't shadow ban people. Let the people make up their own minds. They can not do so if you hide minority opinions.

## Governance

### ESSAY TEXT

I don't care. The bored is facebook's idea. They should pay for it, right? Now that Facebook is public, and has been for a while, Facebook's must act to make money for its shareholders. Good luck.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_2vdgSVRotmy2vtR                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

I think the public should be allowed to nominate and elect members of the oversight board.

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## Decisions

### ESSAY TEXT

I think as much information related to the board, it's members, and their decisions should be made easily available for review by the public, and I think the public should be able to by some process choose at least some portion of the cases reviewed by the board.

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## Governance

### ESSAY TEXT

I think facebook itself should fund the board at a flat rate, and that facebook staff should have as little contact with the board as possible.



| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2XpOcnqOtwRzW9J                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Aaron Travis                                   | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Members should not be overly partisan or politically active. Facebook should not be solely responsible for selecting the initial board membership, due to conflicts of interest with its dependence on ad revenue. The first set of board members is by far the most important, because they will set precedent for decisions.

## Decisions

### ESSAY TEXT

There needs to be an initial amount of work put into clarifying Facebook's existing policies, rather than taking on every single case one by one and figuring it out over time. It needs to be extremely clear and extremely simple if you want 2 billion people to understand it. After that, deliberating and justifying decisions becomes much easier.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2ylwkqbcOf5rJ                                | United Kingdom of Great Britain and Northern Ireland              | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Richard Wingfield                              | Yes                                                               |                   |
| ORGANIZATION TYPE                              | ORGANIZATION NAME                                                 |                   |
| Privacy or digital rights organization         | Global Partners Digital                                           |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Appropriate criteria for membership: We have no particular comments on the appropriate criteria for membership, beyond the need, which has already been recognised, for the Board as a whole to comprise as diverse a range of members as possible in terms of personal characteristics, experience and expertise. Selection process (initial): While Facebook has announced that it will select the first group of Board members, we believe that to enhance the Board's legitimacy from the outset, Facebook should give consideration to ways to mitigate the perception of bias that might stem from a board entirely selected by Facebook with no external consultation. We propose a slightly different approach. Facebook should establish a selection committee which comprises individuals from, or representing, Facebook as well as individuals who do not ('lay members'). We do not make any recommendations on the size of this selection committee or the balance between Facebook and lay members, however we do recommend that decisions about the first Board members be made on the basis of consensus and on the basis of Facebook's criteria. The lay members would be chosen following an invitation process and the names made public. Selection process (future): We believe that the Board should choose its future members, however we recommend that this should be done through an open call, supported by the Board's secretariat during which nominations can be received from anyone, including Facebook, civil society organisations, and users themselves. Conditions for termination: We have no particular comments on the conditions for termination of Board members. Terms of agreement for Board members: We have no particular comments on the terms of agreement for Board members.

## Decisions

### ESSAY TEXT

Criteria and process for case selection: In the first instance, we believe that the secretariat to the Board should be able to filter all cases so that only those that meet certain procedural requirements (which we suggest below) are taken forward. This would assist in making the case load for the board itself more manageable. Users who have raised a case should be informed if the procedural requirements have not been met. Further, the board should develop its own criteria, set out in procedural rules, for deciding which cases it shall hear from those that have been raised. We do not make any recommendations as to what these criteria should be as this should be decided by the Board members, however we would expect that those criteria would help ensure that the Board's limited resources can be directed to those cases which will have the greatest impact. Applying those criteria, we support the proposed approach of smaller panels deciding which cases should be considered by the board. We would, however, suggest that these smaller panels make their decisions, as far as possible, on the basis of consensus, rather than a simple majority. Ability for users and/or the public to request review: We believe that individual users should be able to request a review of a decision, and that in order to do so, they

should be required to complete a form which requires a degree of detail to be provided regarding the challenge, including the evidence of harm (with sufficient flexibility to account for the difficulties that might exist in demonstrating harm). The Board would only consider cases where this information had been provided and to a sufficient degree of detail and requests that did not meet the criteria would be disregarded. The role for precedent and influence on Facebook's rules and policies: With regard to precedent, to ensure clarity and the understanding of users, we believe that the Board's decisions should be as consistent as possible, meaning that once a decision has been made by the Board with regard to a particular piece of content, the default position should be that the same decision should be made on the same or similar pieces of content. There may be circumstances where an exception could be made, although the more often this happens, the greater the risk of repeat requests being made to review the same or similar pieces of content. To minimise this, we propose the following: First, the Board should determine through its procedural rules not to select cases relating to content which has already been considered in a previous case. An exception would be made only where there had been a material change in circumstances which warranted a review of the original decision. In such cases, a larger panel could be selected, potentially including the panellists from the original decision (but ensuring that the majority of the larger panel is not from the original decisionmaking panel). Second, where a panel is reviewing content that had already been considered in a previous case, it should set out in its decision if it has taken a different approach to previous panel and, if so, what the reasoning for that different approach is. Third, where a panel is reviewing content that had already been considered in a previous case and is considering taking a different approach, it could be required to invite other board members to provide their views. With regard to influencing Facebook's broader rules and policies, we believe that the Board should be able to recommend changes in two circumstances: First, through the decisions of the Board themselves. Where a decision is made which relates to the underlying policies in such a way that those policies require amending. For example, if the Board considers that a number of decisions relating to content removal have been wrongly made, and that this stems in part from some vagueness or ambiguity in the underlying Community Guidelines, the Board should be able to make recommendations (which may be distinct outputs from its decisions) in relation to the relevant Community Guidelines, e.g. a general recommendation that they be clarified and/or with the Board suggesting specific revisions. Second, proactively. To ensure that the Board is genuinely an "oversight" body, it should not be restricted in reviewing Facebook's content policies only when a particular case has reached it for review. Instead, it should be able to proactively monitor the policies and their enforcement, and make recommendations about any policy changes as and when it feels necessary. This ability would allow the Board to be more dynamic and responsive to new or changing situations, and would benefit Facebook by allowing the Board to raise potential issues to Facebook before problems arise (or increase in scale) when content decisions are made.

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## Governance

### ESSAY TEXT

Source of compensation for the Board and supporting staff: We believe that Facebook should pay the costs of compensating the Board members and its supporting staff. Board administration: We have no particular comments on the Board administration and would instead leave this to be determined by the Board itself through its procedural rules. Transparency in decision making and operation: We have no particular comments on the level of transparency in decisionmaking beyond those set out in our response to the second essay question. With regard to the operations of the Board, these should be as transparent as possible with, for example, any internal procedural rules made public, and a report published annually on the Board's operations over the previous year. Periodic, public reports from the Board: We recommend that the Board publish an annual report setting out its work over the previous year. This report should include information on the decisions reached and whether they have been fully implemented. It should also include information on any broader recommendations made, and Facebook's response to them. The report could also include analysis and reflections on broader trends and issues. Facebook's implementation of Board decisions: As we suggest in our response to the second essay question, following each decision, Facebook should publish a response setting out what steps in plans to take to implement the Board's decision. Facebook should also inform the Board once those steps have been taken. The Board should have the power to review that implementation process and, if it considers that it has not addressed any problems identified in its decision, make this clear to Facebook. This process should be repeated until the Board is satisfied that its decision has been fully implemented. Where the Board makes broader recommendations relating to Facebook's policies, these should not be binding on Facebook in the same way as its decisions about specific pieces of content, but Facebook should nonetheless be required to publish a response setting out what steps, if any, it plans to take in relation to those recommendations.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_2YwY3Zbo11hRzug                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
| Bill Doak                                      | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

1. Membership should consist of those with advanced experience and established expertise in their chosen field or endeavor, with a proven track record of fairness and impartiality among their peers. In certain fields, such as academia, qualifications ought to be supported by collegiality; in STEM fields, work product as a member of a productive team would serve as a reference; in skilled areas, experience combined with a career of innovation geared to advance human progress in a particular field, in understandable language, should serve as a good qualifier. Time of experience ought not to disqualify any expert in any field. Quality of that experience, clarity of expression, patience with others, the ability to think logically and realize both what is known and unknown should be the standard by which Board members are measured best. 2. Selection process: Recommendations of college and university presidents might be a good starting point, and that could be combined with experts in the fields of history, anthropology, physics, philosophy, literature, the dramatic arts, sociology and history. 3. Conflicts of interest, proof of discriminatory behavior, advocacy or promotion of religion, active candidacy for national office, Facebook-related industry lobbying work, failure to disclose certain investments, any inappropriate personal behavior. 4. Agreement to not disclose the personal identity of fellow Board members before, during or after adjudicated work projects or work product. Mutual respect and agreement to support the majority opinion as one Board in unity before the public.

## Decisions

### ESSAY TEXT

First, there should be five levels of cases that would be ranked for review by staff. 1. Obscenity. The current Facebook standards would remain in effect. Those cases clearly in violation of Facebook's terms of use would not be reviewable. 2. Standards - Posts in violation of cultural community standards would be reviewed by an appropriate cultural panel of the Board. Where that violation is unclear, the Panel would research the item in question and notify the poster of its actions, report back to the full Board with a recommendation. 3. Visual signifiers, codes and symbols - Hidden messages and posts designed to carry hateful or conspiratorial messages would need to be reviewed as they are noted and noticed by staff or the public. Such clues could very well trigger proactive alerts to public safety outlets in an expedited fashion. These might be red-flagged by staff for preemptive action concurrent with Board review. 4. Political controversy - Posts which harm or damage the reputation of others, are false or unproven, or which curtail or have the potential to harm the individual freedoms of others should be reviewed. As a free society devoted to democratic principles, calls for violence or threats ought not to be promulgated on Facebook's platform. Accounts ought to be carefully monitored to ensure any party promoting hate not have access to Facebook's town square. 5. Posts promoting good should be rewarded. The Board should take the time to find subtle ways to use Facebook to strengthen the bonds which make our communities vibrant and strong.

# Governance

## ESSAY TEXT

Suitable salary might compare to the professorship at the University of Carlsberg sponsored by the Carlsberg Brewery. The non-profit oversight could be a board that is advisory in nature and consisting of experts in a diverse range of occupations, from academic to business to those who could be members of a social enterprise that is the equal to the United Nations in scope. Regular publications would inform the world where Facebook thought might be on any number of issues. Most would say accessibility of the internet is a human right that should be incorporated into the Bill of Rights just as freedom of the press is part of this founding document. A formal amendment is needed to prevent government from disconnecting anyone from the internet, even during times of a so-called public emergency. Facebook retains the language of implementing the Board's decisions. But for the Board to truly have autonomy, the company would have to agree to yield to the Board in advance on the finality of its decisions.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_2ZCQs70UjLpPQI5                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Jill Seibert                                   | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Decisions

### ESSAY TEXT

Currently the process for reporting inappropriate content is unfair, arbitrary, and incomplete. We are given a very small variety of choices instead of being able to explain exactly what the offense is. For example, there is a page/group I joined called Florida Ex-Offender Reentry Coalition. I joined because it claimed its mission is to help ex-felons. Instead it is a right-wing propaganda page. When I tried to report that, I was given a bunch of reasons to choose from for why, none of which were accurate; and there was no way for me to explain the exact issue. Currently reports are made to a nameless, faceless, incomplete questionnaire with no possibility of two-way conversation. FB makes its decisions on inaccurate information and there is no way to discuss it further with anyone. There is so much hate on FB it's absolutely staggering. I have seen women, Muslims, refugees, LGBTQ, and people of color attacked by white supremacists and FB does nothing. Yet, Black people cannot talk at all about white supremacy without getting banned. That needs to stop. Now.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_31EEKdNJoL1xgnf                              | Argentina                                                         | Spanish           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Facundo Rubén Sagardoy Solís                   | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The criteria for the selection of memberships will be the same as those required by governance to hold public office: merit criteria and personal and professional capacity are the substantive elements of the personnel selection processes that make up the public function. This is because public function is developed in consideration of the principles of equality, merit, morality, efficacy, economy, fairness, transparency, celerity, and publicity. A guideline to illustrate this point for the Americas and the rest of the world is the Code of Ethics of the Public Function established by Decree 41/99, in Buenos Aires, on 27 January 1999, according to which probity, prudence, justice, temperance, suitability, and responsibility are general criteria. In another segment, this same code adds the particular principles of eligibility, training, legality, assessment, veracity, discretion, transparency, a financial affidavit, obedience, criteria independence, equity, equal treatment, the appropriate exercise of the office, the proper use of state assets, the proper use of working time, collaboration, the use of information, the reporting obligation, dignity and decorum, honour, tolerance and balance. Throughout the world, the selection processes that are most appropriate for the requirement of transparency in the election of candidates or officials to hold public office is the one that takes place in competitions in which the suitability and merits of the candidates are assessed. To this we add two special criteria, one of quota for the benefit of women called “gender quota” and another for persons with disabilities, called “disability quota”. The conditions of termination of membership must be those opposite to those indicated by the selection criteria chosen to guide the conduct and attributions of the officers of the Board. Their appeal and the consequent recusal of the membership must, however, be based on evidence that may be verifiable by the rest of the members, in a fair process that allows the official to defend him or herself. The terms of agreement for the members of the Board must not exceed 48 hours as of the occurrence of a breach of the community standards and policies, a term that could be extended to 30 days for investigation purposes in the event of a complex fact, depending on the extent of the breach and the number of participants.

## Decisions

### ESSAY TEXT

The criteria for the selection of cases to be treated must be five: a) Severity of the fact, b) Risk for the victim, c) Institutional relevance, d) Representativeness of the case, and e) Opportunity, merit or convenience. a) Severity of the offence: When the fact can fit into seriously outrageous figures; b) Risk for the victim: When the characteristics of the aggressor, the circumstances of the act or the situation of vulnerability of the victim indicate the existence of a serious and imminent risk to his/her life or integrity, or to more people; c) Institutional relevance: In the case of a situation of adverse action or delay, or a serious re-victimisation, generated by the action of internal arbitrariness or the administration and supervision system; d) Representativeness of the case: When the case is representative of a systematic pattern of violence of some kind or of an institutional practice contrary to the human rights standards that govern the matter; e) Opportunity, merit or convenience: When there are reasons of opportunity, merit or convenience according to the work plan established by the Board. Users and the public must have full capacity to access the services offered by the Board. The members of the Board cannot ignore actions faced by previous members or proposals composed of the

customs that are accepted within the community of users. The decisions of the Board must take immediate action. The procedure and the foundations of the Board should be based on its own case law, standards, rules and customs adjusted to community policies, to the ethical principles of its exercise, to the general principles of law, legislation and international treaties. The level of transparency of the deliberations and decision-making process of the Board should be full, current and informed. The presentation and deliberation of cases should be disseminated in all possible forms and languages, through certified channels.

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## Governance

### ESSAY TEXT

The source of compensation for the Board and support staff must come from the company that owns the platform or from collaborations that users can send to improve their service, in support of initiatives that emanate therefrom. The administration of the Board can potentially be managed by an independent body. Transparency in the decision making and operations of the Board should be a result of the guaranteed process, the universal access to its services and the suitability of its members to resolve cases. The Board must issue periodic public reports once a month, so that its activity can be processed with statistical methodology. Facebook must assume the decisions of the Board as proactive actions within the established deadlines. Communication between Facebook staff and the Board must be permanent through certified channels.



| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3CBk6aNxKw6n46l                              | France                                                               | Spanish           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

21 years old or older (with various ages), people from diverse cultures, religions, languages, with diverging point of views, who are Facebook users AND appreciate the company (you don't have to waste your time and resources with someone who isn't a fan of your marvellous company). - psychological test (no attention seeker, people who tend to react too quickly and not think first), someone who does not already work for Facebook, although one member of the board should be someone highly placed at Facebook (maybe Mark), minimum of a Bachelor's degree or equivalent, someone with an international background who understand different cultures. Someone invested in the success of Facebook. - sharing names of other board members, negatively influencing Facebook or its brand. - not divulging other board members identity, be culturally sensitive, not publicly criticizing Facebook decisions, respecting the decision after it has been put to a vote, not divulging cases discussed during meetings (especially sensitive cases).

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3EcL2pTJorJzewB                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Governance

### ESSAY TEXT

Transparency: public, in reporting, decisions, communication Nonprofit administration for oversight Monetary compensation determined by Facebook.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3G9PgGbxkmOWfab                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Enrique Armijo                                 | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

It is critical that Board members have the training and capacity to explain their decisions and interpretations of the Standards to the public in written form. It is also important that Board members who disagree with a particular panel's decision with respect to a piece of content be able to express those views as well. That way, the Board's decisions will become guiding interpretations to future users, as well as future Boards, with respect to moderation decisions.

## Decisions

### ESSAY TEXT

See previous comment.

## Governance

### ESSAY TEXT

Public reports are critical to the Board's work. As Mark Zuckerberg stated in his recent Washington Post op-ed, reports will give users insight and transparency into content moderation decisions and their administrability. Some interaction between Facebook staff and the Board with respect to how the Board works is going to be inevitable. Facebook should not attempt to build a wall between the Board and its staff. A properly selected Board would not be influenced or suffer from the appearance of influence by Facebook staff.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3gLr7PgW49Y8UXs                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Decisions

### ESSAY TEXT

The scale of this undertaking is going to be immense, while the quality of the decisions is going to be incredibly impactful and controversial. That's an incredibly delicate balance to strike, particularly with a board of this size. In my opinion, the top priority should be making very thorough, grounded decisions on the most impactful cases - either by severity or broader applicability - so that a few decisions can inform countless others downstream. One case that I may reference throughout is of our recent stance on anti-vaccination advertisements. A lot of the logistics, structure, and presentation style of these decisions could be taken from different governments' processes, like the US Supreme Court's, and adopted in a more lightweight format. I would like to focus primarily on the selection of cases, the implementation of the decisions, and the influence they have on our policies. I work on the Enforcement Recovery team within Business Integrity at Facebook, analyzing the trends in appeals and aggregating those into broader insights to pass upstream to policy and protocol teams in an effort to close gaps. That, from my perspective, is closely related to the work your team is doing.

- Case selection: We should have a team dedicated to analyzing the trends of Community Operations appeals to siphon out the most broadly applicable issues. This would happen in parallel with an analysis of social media sentiments (on the Business Integrity side, we have a Social Media Monitoring team for this) and high visibility escalations, PR reports, and public petitions. This team would filter, aggregate, and present these insights to the board for review. By filtering these, we could significantly reduce the volumes the board needs to review and ensure that the caliber and usefulness of each case decision is incredibly high. Anti-vaccination trends were visible through most of these channels, and examples could have been collected to make the case stronger and the decision more broadly practical (rather than overfitting to a few examples).
- Implementation of Board decisions: While this sounds easy in the context of a single case, if we follow the above case selection process, implementation will actually be fairly difficult - because the decisions will have broader implications. We have a Tactical Enforcement team in Business Integrity dedicated to these mass action sweeps. They run keyword fan-outs (with precision checks) to compile relevant ads, listings, etc. and then use scripts and reviewer teams to take them down in mass. Community Operations could mirror this with minimal reinvention (and may already have a team, sorry if I'm repeating work you've already done). After making the call on anti-vaccination advertisements, for example, we could have run a mass sweep of the platform and retroactively taken down related posts by a number of high-precision keywords - or we could just have this inform future decisions, which is likely a broader conversation.
- Influence on Facebook's policies: In my experiences, policies change really slowly. Overturning a single decision that we've deemed acceptable is not the same as expanding our policies in a way that prepares for all the possible false positive and false negative risks. This is something we need to make sure is super clear publicly. With that being said, though, it's important that we can move quickly on these changes. The prevalence research in the selection and implementation stages could streamline the process as we would have an idea of what the broader issue really looks like and the decision would have been approached in a way that addressed that, rather than just an ad hoc issue (though we could certainly address ad hoc issues, too). These insights and their respective decisions, which are hopefully really high-value signals at this stage, could then be passed off to the existing policy teams (probably with additional headcount to support these volumes) to run additional risk investigations and, depending on the outcome, enact the policy and / or protocol change. This is really incredible work you all are doing, and this wide of an entry point for feedback is really respectable. I hope these thoughts are helpful, but I've read up on the work you're doing and am confident you've thought through a lot of these things. Thanks for taking the time to read my feedback!

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3knwO9RrIV3EsE9                              | Sweden                                                               | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

Knowledge about the domain is key. The board should be able to understand the different perspectives of people using Facebook. Therefore a combination of different background and opinions are welcome. However, it is important that board members are able to leave their particular context and rule and reason taking other perspectives in mind. A suggestion is to let different interest groups such as NGOs, the general public, government actors, representatives of Facebook and representatives from Academia nominate and appoint delegates. Online tribalism would be the biggest challenge and the ability of a candidate to act fairly and not as a representative for a particular group should be the most important quality for a candidate. The independence of the board is important and for it to function effectively there need to be structured to protect delegates from attempted deplatformisation. Therefore it should be the decision of the board to terminate a delegate from the board.

## Decisions

### ESSAY TEXT

The most important role of the board is to develop the rules and the applications of the rules in the Facebook community. It is therefore important that Facebook choose controversial issues where good arguments on both sides are to be found. In many cases, FB users have had a hard time to understand why their posts would breach any community rule. Especially this has been an issue in non-English context where the distance between FB and local communities have been large. It is therefore important that the review of the panel is used to develop the application of FB rules to different domains and contexts. For this reason, it is also important that the board clearly explains their reasoning for why a certain decision was made so it is 1) clear for the users of FB what the rules actually are and 2) that the public is allowed to criticize rules that they do not agree on. This would allow for concrete and factual debate on what should and should not be allowed. This would strengthen the facebook community.

## Governance

### ESSAY TEXT

I would see the board as being a guiding body within facebook overviewed by third-party organizations. In the end, FB is a private company and it would be up to the management team at FB to implement any particular decision. The board would function as an advisor to FB and formulate concrete suggestions on particular issues. Facebook would then need to decide whether or not to follow the recommendations of the board. With a high degree of transparency in terms of operations, the board would allow for review from anyone, not only a selected number of preferred NGOs or bodies. It is important that the board is providing material on the decision they take so that the decisions can be reviewed by anyone. This should follow the principle of open governance as applied by many governments around the globe. In the end, trust is the most important variable, and openness would contribute to such a this.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3lKydYX2E4VGNgx                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

There are groups of people who've been shown to be disproportionately mistreated. Despite Facebook's efforts to insulate itself from outside criticism, I'm sure you have some understanding of who those people are (e.g. trans people and closeted LGB people vs. your real-names policy; the recurring cases of chaste photos of gay men snuggling or homoerotic art being censored, while reported explicit naked images of women are not). You need to find representatives of those people \*first\*. If you run out of seats for, say, wealthy straight white Christian men, so be it. Marginalized people can empathize with them more easily than the other way around. It's clear that you haven't done this in hiring the half-trained temps at the "community standards" desk, and that shows... it's part of why you're where you are now, doing this. I also have to stress how bad an idea it is for Facebook to select who's on this board, initially and ongoing. Again: you've already shown you're bad at that. Your hiring demographics show the same disturbing people-similar-to-me tendency. How do I apply?

## Decisions

### ESSAY TEXT

Your current access to review is wholly inadequate. I've NEVER been given the option to appeal, despite being blocked multiple times since Facebook started claiming that was available. At the very least, the "accused" (presumed guilty until they prove themselves innocent) needs to have the opportunity to address the reviewer (which would also require giving them some specific explanation of how they've supposedly broken the rules). The American judicial system is a good model: appeal should always be possible, up to the top level. That doesn't mean it has to be as simple as clicking an "appeal" button at the higher levels, but if someone is willing to put the work into asking for a better opinion, they should get that. This is more of a policy issue, but since this is the first and probably only opportunity I'll have to provide feedback to FB and have someone read it: The escalating block periods for supposed violations are draconian. I'm a professional artist who is trying to use Facebook within its terms, but last year I was bam-bam-bam-bammed up to being blocked 30 days at a time, apparently because I linked to my web site which has nude art on it. I've responded by no longer linking to it, and posting very little art – basically using FB for professional networking, not promotion – and I haven't been blocked in over a year. But one wrong guess about what's allowed and I can be locked out for a month... maybe forever... I have no idea.

## Governance

### ESSAY TEXT

Source of compensation? Take enough out of Zuckerberg's pocket to set up a self-perpetuating trust. He won't miss it. Transparency is critically important. Your current censorship processes are a black hole: nothing comes out except bad decisions and boilerplate. There's no articulation of WHY and HOW something violated your standards. I've been blocked several times without even being shown what the offending image was. That obscurity – and the inconsistency – makes it impossible to follow standards.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3NxonMRluthsvvo                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Sandy                                          | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

Governance

ESSAY TEXT

The board should have great diversity, and attempt to represent different backgrounds, age groups, political views.



| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3Pk9wrLY4HBrHMS                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

# Governance

## ESSAY TEXT

This idea seems like panacea. I'm not seeing how something like what is being proposed will work in any meaningful way.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_3PRzU0kWe7s7uVr                              | Israel                                                               | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

I am concerned that whatever model you propose will end up biased. Any attempt to limit free speech through oversight will, by default, attract the people who want to limit free speech - and they will try to find a way to game your system. The biggest problem I've personally faced with FB is reporting anti-Semitic statements (in various forms, including anti-Israel statements) sent to me or posted on my pages, yet FB never seems to have acted on those reports, other than deleting those comments, or hiding them from me. My friends report the same problem. On the other hand, I have many, admittedly strongly opinionated, friends who have found themselves in "Facebook Jail" with no ability to appeal, and in my opinion, undeserving to have been locked out, simply for having made statements that were factually correct, but not PC. - A question/problem FB faces, for instance, is, who determines who is an anti-Semite and what to do with them? As a Jew, I firmly believe Congresswoman Ilhan Omar is one. Your board/panel might not think so, nor, for instance, would Bernie Sanders. On the other hand, the Simon Wiesenthal Center would strongly agree with me. So who are you going to pick to be on your board when there are 2 strongly opposing views? And then what would you do about it? Ban Ilhan Omar? Put her in FB jail? Unlikely. - I don't trust that a Facebook board or panel will properly determine that a "dog whistle" comment is anti-Semitic. But I do trust my friends. I don't trust that a Facebook board or panel will agree that a non-PC remark should not be punished. If I were designing a better system for FB, I would allow users to rate other users and pages on a sliding scale in various areas (anti-semitism, political views, gender issues, etc.) and then allow users, on a sliding scale, to decide who is allowed to comment on their page, based on those ratings. To make the system even more effective, allow users to select general user ratings, or other users they trust, or a combination and give their friends ratings more weight. Similarly, when going to a page, I could then see how my friends and users in general rate the page on the various scales, and determine if I want to go there.

## Decisions

### ESSAY TEXT

Users must be able to request review. The panel and board members, and their decisions, must be transparent to expose if they have bias.

## Governance

### ESSAY TEXT

How will you determine with non-profit or think tank to include? They all have biases - especially when it comes to issues of politics. How will you guarantee that if you pick a leftwing think-tank that it will be balanced by a right-wing think-tank?

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3q9BHCR4hEgwnC0                              | Republic of Korea                                                 | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Kyung Sin “KS” Park                            | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Decisions

### ESSAY TEXT

I agree with most of the “suggested approaches” in the draft charter. However, I disagree with the plan not to link panel decisions to individual panel members. What Facebook is doing is in a way to set up an authoritative (not as in compulsive but as in persuasive) decision-making process that the Facebook “community” of users can accept as their own rules of online behavior. One such way is to follow democratic principles of self-governance as much as possible. Election will be one beautiful way to do so but I can see that it can be very cumbersome and often dangerous. The next best option is to appoint independent experts who can carry out the difficult job of promoting human rights in a democratic way, and by ‘democratic’ I mean that their decisions should be subject to scrutiny. If you do not make the disclosure of the panelists, you might as well not disclose the panel decisions because we need the weight of the scrutiny to bear on the future decisions of the panelists. If you do not make that disclosure, what you are doing here is basically setting up “forced arbitration” for all content disputes. If you wanted that, I think you could have done so without this public consultation process. If you want an authoritative content moderation decision, you want to start a virtuous cycle of mutual legitimization: (1) the panelists to be respected for their work and (2) the panel decisions for the authority of the panelists. Not knowing the panelists will miss the point.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_3qpvRGUIRJ89yTS                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Anne Collier                                   | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Membership criteria: Because political, cultural and sociological context is essential to making decisions about social media content, the most important criterion for Board makeup is representation and knowledge local to the content in question. There are 190+ countries on the planet, however, so – because the Board can’t have that many members – the membership will have to represent as many countries and languages as possible in each region of the world. Membership representing each region (e.g., eastern Europe or Caribbean countries) will also need to include, if not national representation, then in-depth knowledge of the countries’ political systems, institutions and cultures. The full Board will need to 1) represent all races and have ethnic diversity, as well as equal male-female gender representation and representation of other gender identities and sexual orientations; 2) have socio-economic diversity (the Board should not represent only social and economic elites); 3) represent some understanding of how social media systems work (abuse reporting, recommendation systems, content moderation, advertising, machine learning algorithms, etc.). Individual members: have college/university degree, have user-level knowledge of social media, work well with people, have a willingness to learn. Each new member will need to undergo an Oversight Board orientation process. Appointment and announcement of the membership only would be done by the FB Global Policy team only initially in consultation with the public, FB advisers (such as researchers, the Safety Advisory Board and content moderation vendors), and national and international NGOs representing every region of the world. Subsequently, selection will be done by a subset of the Full Board constituted of the (approx.) 1/3 of members in their final year of service – or the size of one of the Boards decision making panels – in consultation with the Board’s staff, and academics and NGOs in the appropriate region. Conditions for termination: any illegal activity that comes to the attention of FB, Board or the Board’s staff; failure to adhere to a Code of Ethics that the Board and its staff establish in consultation with Facebook and its advisers; misrepresentation or abuse of the Board’s power or their power as a member. Terms of Agreement: No government service or regulatory role while in office; standard principles concerning conflict of interest, nepotism, standards of impartiality; honor human rights as laid out in the UN Universal Declaration of 1948; adherence to national laws unless they conflict with basic human rights; honor staff expertise in national laws and regulations. One model to consider for this Board’s setup is that of “super-regulation,” as described by law professor Gillian Hadfield at University of Toronto (see this description <https://gillianhadfield.com/2017/11/28/world-needs-21st-century-regulation-to-police-gig-economy/> with links to further detail).

## Decisions

### ESSAY TEXT

All of these questions really cry out for a multi-disciplinary, cross-functional discussion, but a suggestion or two for each bulleted topic: \* Criteria for cases: A controversial case in a particular society where the deletion was disputed/challenge; borderline cases where violation of Community Standards is not entirely clear; high-profile cases (reported in national news media); cases involving imminent threat of violence or physical harm.... \* Along the lines of the US’s Freedom of Information Act, individuals including news media can request details of a case’s decision process, but such details of individual cases are not otherwise published; Board reports aggregate decisions, provide statistics and reflect trends (along the lines of

current social media transparency reports). \* Influence on Facebook's rules & policies: Over time, the Board's decisions and activities should inform Facebook's rules and policies for the simple reason that FB is in every country and the Board represents local and regional understanding and context. \* Implementation of Board decisions: Any failure on FB's part to honor its decisions will harm both the Board's and Facebook's credibility and set a powerful negative precedent. As for the how: There may need to be 2 tracks both for Board decision making and FB implementation: emergency and non-urgent decisions. Procedures would need to reflect level of urgency. Implementation would probably also require a designated contact on all appropriate/related Facebook teams, as well as the national law enforcement agency and government related to the case. \* Process/basis for decision making: Clear deadlines/time durations for each procedural phase: choosing of cases, communication to appropriate panel, designation of staff support, staff research, panel discussion and then decision making, Board vote; communication of decision to FB; FB implementation. \* Transparency: Earlier in this questionnaire I suggested the identities of individual members of a decision's panel should be made public, but as I think about it – and as panel members will likely be more local to the case – this may be a security risk to panel members. So the full Board's names and bios should be made public for the duration of membership, but the members of each panel should not be public knowledge. The public should know the what and the why of the decision for each case – the latter in the form of a short summary. If someone wants the full write-up of the case, they can apply, and Board staff should have a time limit on responding to such requests. \* Form of presentation/deliberation: All Board members and staff should have access to a secure system and database to which FB's moderation team submits cases, which includes email and FB Messenger notifications of each new case. That system includes a no., brief summary of what led up to submission, why the case was submitted, what country, panel assigned and other basic information behind which more in-depth info sits and to which all assigned parties have access. Board members/panelists not assigned can refer to summaries for ultimate voting. The secure database will automatically generate anonymized statistics, trends and details for the Board's published annual report and for "freedom of info" requests for details.

## Governance

### ESSAY TEXT

A lot of this has been covered in the first two questions. Beyond those, first 2 bullets: The Board should be set up as its own independent entity based somewhere besides Menlo Park, Calif., possibly in NYC or Geneva, Switzerland. Whether it's a for or not-for profit entity should be determined after the "town halls" around the world by an independent academic and NGO committee designed to determine the business model, selection criteria and process and compensation. Compensation would obviously have much to do with the amount of time Board members are expected to give to the work. Their work might take 2 forms: merely voting (final decision making) and the more in-depth work of panel assignments. In order to control the amount of time each Board member devotes, perhaps they are given a limited no. of panel assignments per year instead of being assigned of all cases in their own region. A third form might be called "cultural consultation" where staff would do most of the research but consult with the Board member[s] of the case's region for political/cultural insight. I touched on the rest of the bullets earlier but, on the last one, communication between Facebook staff and the Board should be a formal channel between FB staff and staff at this new entity called the Oversight Board, perhaps the office of its executive director. The "super-regulation" model conceptualized by Gillian Hadfield (mentioned previously in this comment) has explored both nonprofit and for-profit models but suggests that either way the regulators need to be in the private sector (<https://works.bepress.com/ghadfield/63/>). With the Oversight Board, Facebook is pioneering the new layer of regulation and moderation (user care) that's demanded by our planet's new media environment – a global layer that governments weren't set up to regulate and that never occurred to us we'd ever want or need to create. Dr. Hadfield has proposed one approach to the \*regulatory\* part of this new middle layer. You'll find thoughts on both that and the user care part of the layer in my recent post at Medium.com – <https://medium.com/@annecollier/digital-safety-2019-2-parts-to-the-emerging-middle-layer-8d763453b5eb> – with a follow-up about the Oversight Board here: <https://medium.com/@annecollier/facebooks-oversight-body-the-middle-layer-s-next-big-step-6b1a22321219>. The biggest question, one not asked here, is about how the Board interfaces with national governments. For regulation, Hadfield suggests that each government will need to authorize the new kind of regulator (sub in Oversight Board), "confin[ing] the regulatory role of government to the licensing and supervision of private frontline regulators, and harness[ing] market incentives to spur the development of better regulation." She suggests that the 'super-regulators' be competitive, whether or not for-profit. "Then, rather than individual governments each drafting rules and procedures to achieve these outcomes, that task is given to the market." Specialized private regulators, who would by definition understand what they're regulating better than governments, would "build regulatory systems and secure government approval by demonstrating that the entities they regulate achieve the determined goals." Maybe that's not possible worldwide, because it's hard to know what attaining that government approval would look like in Brazil, Myanmar or, for that matter, China or Russia. Maybe it's done through a public ombudsman or government-focused liaison for each country or region who is a Board staff member (see researcher Tarleton Gillespie's proposed set of "new layer" elements in Wired.com <https://www.wired.com/story/how-social-networks-set-the-limits-of-what-we-can-say-online/>). Without

some trusted third party in each country, Board relations with governments could become highly charged in some countries, so I believe the new layer will be “safer” for Facebook, or at least less fraught, if/when this Board becomes cross-industry and about more than content moderation appeals – and when it becomes “one-stop shopping” (simplified and clear) for users of all education levels worldwide. So kudos for Facebook in taking this daunting first step, learning “out loud” and co-creating this new kind of institution and service layer with the Internet using public.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_507S8oWRjD32Fy1                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
|                                                | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

2.32 billion active users speaking nearly 101 languages on the World with more being added. Each language brings its own cultural and contextual nuances. Expecting 40 people to represent, understand and adjudicate cases of such diverse user base is probably not a realistic expectations. Doing so will disenfranchise segments of user base who are unrepresented and whose cases are not understood. Criteria for membership should be academic and professional background as well as their own published posts. The evaluation should be weighted in favor of the published posts and comments. Consistency of views, in my opinion, carries a higher value in this case than any single view, though single views should be accepted as dis-qualifiers. For initial nomination, Facebook should be able to classify and identify the most suitable users from each cultural context. The members can be chosen from this set of nominees or the list can serve as the general assembly. To choose members, a scoring rubric can be adopted and published. Highest scoring members can be presented to the General Assembly for final selection. Elected members cannot be terminated. This is the best protection against influencing the decisions. Board can discipline errant members but termination should be after a rigorous process if at all. A possible ground could be a conflict of interest via financial or political connections. On selection, the Board Members should sign agreements to ensure that their decisions are impartial and selfless.

## Decisions

### ESSAY TEXT

Cases should be selected as representational, where the issues can be boiled down to a single, over-arching decision point; A vs B. Cases sent to the Board for deliberation and decision can be chosen by the Facebook or escalated by the appellants. Public should be able to request review the Board's decisions on grounds presented at the time of making the request for review. Decision to reopen the case or not should be evaluated on the basis of the grounds for such an application. Laws of the land would supersede the Board's decisions however, there can be an issue of jurisdiction in cases involving International stakeholders. While precedence is an important factor in case law providing the benefit of stability to the social evolution. However, in the arena of social media, changes travel at the speed of thought. The Board must remain responsive to the social evolution that is fed by the social media itself. however, to prevent significant and sudden divergence from the norms, the precedents should influence decisions. I am not sure how long would it take for a significant cache of case law to be built? By significant, I mean of sufficient depth and breadth as to prevent significant divergence from the norms. Facebook organisation should remain responsible for implementing the Board's decisions. The Board should issue written judgments, deconstructing issues, identifying decision criteria and merits of choices made by the Board. Dissent should be recorded but not on the decision. Boards processes and decision-making processes should be as transparent as possible while preventing loss of privacy for Members and stakeholders of the case. Cases should be presented and deliberation should be in closed, online forums. There should be multiple layers of privacy; internal discussion by Board Members, Debate and presentations by stakeholders and QA by Board Members and public record of proceedings with identity information masked.

## Governance

### ESSAY TEXT

The Board members and staff should be compensated by Facebook through a blind trust. The salaries and benefits to be fixed by Facebook. In my opinion, a non-profit organisation would be the most suitable vehicle for providing administration support to the Board. The administrative organisation can be aligned with Academia in plural but not with any single University. The Board would publish report on its operations, caseload and significant decisions at semi-annual basis interval or sooner. Facebook will implement the Boards Decisions through an interface into its project management organisation. The Facebook staff will communicate with the Project Managers at Facebook who will communicate with the Board's Administrative Staff. Board members will only communicate with the Board's Admin staff.



| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_5ncivTqAnD41oJ3                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

I think you have a clearer view of the interests and proclivities of those on FB...well you may have to undo your last couple years of self-policing in order to have a clear view of the specific groups of thinkers and what their worldviews are. I believe that Pareto's 80/20 rule is embedded into everything around us...ignore it to your peril. I believe at this point in history you will find no valuable insights from those we held in such high esteem when in college for they, unfortunately, they drifted off into becoming rabid Marxists and your generation isn't even aware of how this worldview has distorted the way you navigate each day. I believe you all would benefit from looking hard at what poison you have ingested and make some adjustments...no one who has scrubbed the scum of Marxism from their ethos has regretted it. I don't say this from contempt; I say this from pity for they have convinced you that they alone are to the sole purveyors of moral clarity...this just is not true. I can't imagine how impossible this must look if you personally haven't been provided any concrete truth to embrace and build your worldview from. The reason you are suffering so much over this subject is that you have been indoctrinated into a false morality which now forces you to side with your peers and friends and heap contempt on those who embrace the morality that has withstood the test of time. Due to your being kept away from historical reality you are unaware of history and how today's social justice issues have always been at the core of failed civilizations...the pressures you are feeling to be politically correct are classic historical sirens that will lead you personally and our civilization onto the rocks.

## Decisions

### ESSAY TEXT

Since you have decided to enjoy the freedoms of the United States, I believe it is your responsibility to know and understand the laws and the reasons for the laws we have and then apply them meticulously and stop attempting to take this impossible task upon yourselves... you will destroy yourselves and those you expose to this task unless you have a solid foundation, not in a group of people whose worldviews and moral convictions change as they mature.

## Governance

### ESSAY TEXT

Pay nothing and remove all ulterior motives.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE    |
|------------------------------------------------|-------------------------------------------------------------------|----------------------|
| R_ANjnI3qSL9aD7P                               | Brazil                                                            | Brazilian Portuguese |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                      |
| Mel                                            | No                                                                |                      |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                      |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                      |

## Membership

### ESSAY TEXT

Specialists in communication, law, ethics, citizenship, philosophy. The selection process could be directed to people who are known to have a social function or engagement with causes that strive for the common good and equality.

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## Decisions

### ESSAY TEXT

Important: this board needs to be extremely transparent and make decisions that facilitate the dialogue and ethical behaviour of users.

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## Governance

### ESSAY TEXT

Opportunity for NGO's and volunteer work.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_BJwP4x3tfowRVst                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

Criteria for membership should assure broad cultural, racial, and gender diversity. It also should focus on ways to evaluate potential members' clear understanding of the complexity of the task at hand. For example, the criteria must be structured so as to assure that the successful candidate will have a demonstratable understanding of the vast numbers of individuals across the globe who may be impacted by the wide-ranging decisions the board will be required to make. In addition to requiring essay-type personal and professional recommendations, the candidates also should be required to submit an essay that describes their reasons for desiring to serve on the board. Those reasons should demonstrate that the candidate understands the public service element inherent in the Board position. The selection process should include rigorous background checking to help avoid any unpleasant surprises that could undermine the important public perception of the board's integrity. Conditions for termination, in addition to a three-year term limit, should include even the potential for a conflict of interest to protect the Board from reputational risk.

## Decisions

### ESSAY TEXT

Criteria and process for case selection should assure that a broad range of concerns are considered. To every extent possible case selection should remain at arm's length from Facebook's profit motives. Any hint that this board is a marketing tool (except in the most indirect way) will destroy the very important public confidence in the decisions made. While any board will have to consider precedent with an eye to the fact that bad precedent can be set, a serious effort to maintain consistency, and thereby, fairness, always should be given serious consideration. In addition to considering precedent, the board should take full advantage of Facebook's resources and make certain that every issue under consideration is carefully and extensively researched. The greater the board's level of transparency in its deliberation and decision-making, the greater will be the public's confidence in those decisions and, thereby, Facebook will reap greater rewards for all the effort that has been given to Board formation, etc. If this board is to achieve Facebook's stated goals, implementation of board decisions must be swift and faithful to the spirit of the decisions. Otherwise the board is a puppet, albeit, an expensive puppet, having no public confidence and no reason to exist.

# Governance

## ESSAY TEXT

Facebook should fund the board's compensation and its supporting staff by awarding an annual budget figure that is commensurate with Facebook's evaluation of the board's value. Within that budgetary figure, Facebook should establish board compensation, with due consideration for the heavier work burden expected of board officers. Thereafter, the board's administration should be done by an independent body, selected by the board, and capable of relieving the board of onerous administrative tasks that will detract from the board's purpose. Basically, the administrative element of the operation should serve as support staff for the board while the board maintains complete budgetary control with the exception of establishing its own compensation. Assisted by its administrative partner, the board should develop by-laws that provide details as to how it will maintain the highest possible level of transparency in decision making and operation. This effort should be given high, initial priority to assure that the entire effort is on the desired track. At least annual, but preferably 6-month, reporting by the board is an absolute essential element of the effort. In addition to operational reporting relating to cases considered, decisions made, background on decisions made, etc., financial auditing should be performed annually. Facebook's quick, good faith implementation of the board's decisions is key to the board's success and even to the board's existence. Without that, the board is merely an advisory arm that engenders no public confidence.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_O1I0pId6QS9ID1n                              | United Kingdom of Great Britain and Northern Ireland              | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Saswati Saha Mitra                             | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

The board needs to comprise of experts in the field as well as regular users of Facebook and its products. By balancing expertise with the lack of motivation, FB should be able to get to what the average user might do. Criteria to look out for: - Examples of critical thinking even if it is not in favour of FB - An ability to empathise with the common people - Some hands on experience with research - Some degree of knowledge about FB's product line and ecosystem trends In terms of selection, I would like to see people who are intrinsically motivated but not necessarily the most well known names in the domains of privacy, safety, identity etc. The world at large needs to feel FB is enabling them rather than put them at the mercy of experts. A jury system is a good analogy here. These board members may be terminated if they fail to protect the interest of the users. They are expected to have difficult conversations with Mark Zuckerberg but the tone of the conversation has to be supportive. Mark should feel like he has an ally in this board- one which will push his thinking forward while being mindful of the business that is Facebook. Any evidence of bribery, collusion and explicit position taking need to be reviewed by a separate Ethics committee that keeps an eye on the Board. Board members need to be paid adequately so that they can dedicate their full attention to this initiative. They will be expected to communicate key decisions being taken at the Facebook developer conference and similar venues. They will also be the representatives of FB in a non-lobbying way towards policy makers and governments.

## Decisions

### ESSAY TEXT

Cases need to be selected based on two criteria- how many people could this decision impact as well as what kind of a precedence might this set even if the specific example is small. The public must always have the right to ask the Board and its larger support team to review cases. It will need a very robust set of previous decisions in order to reduce duplication. The Board should have the ability to influence the policies of Facebook but it should be more via recommendation than strict adherence. The operating model of the UN is a good example to look at. The reason why The boards recommendations should not be mandatory on FB is because sometimes the development of a new technology cannot be fully regulated. As long as there is adequate debate, that's a worthy start. The board should need at least 75% majority to pass decisions on day to day topics. On issues that threaten nations and large population, the decision of the board needs to be unanimous in order to make sure there is the right level of gravity and internal alignment. The board should meet at least once a month focusing on some of the most high stakes decisions. Minutes of the meeting should be shared publicly with inputs from Mark and his leadership team around what they are able to commit to and if not, then why. Cases should be presented in writing prior to the deliberation. The Board should have access to a series of experts should they need more consulting in their decision process. On the day of deliberation, a couple of key stakeholders from FB should also be present to discuss the opportunities and challenges they see.

## Governance

### ESSAY TEXT

A Board that will help keep FB at the forefront of internet policy making needs to be covered by a non-profit subsidiary of Fb. The Chan-Zuckerberg foundation could take a part in this. Board members salary need w e competitive and increased annually so that there's no financial pressure on them. All proceedings of the board should be made public in writing for posterity. Other organisations can learn how to manage their positions by learning from the very best. Facebook needs to create a horizontal framework of how much of the input they receive, they will implement. It is important to even show some progress than none. Communicating what is doable now and what else can be achieved over time are critical. All communication between the Board and Facebook must be in writing and explicitly stored by a Legal team in order to prohibit any conflict of interest.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_rjHtIei6jSFix                                | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Jeremy Malcolm                                 | Yes                                                               |                   |
| ORGANIZATION TYPE                              | ORGANIZATION NAME                                                 |                   |
| Privacy or digital rights organization         | Prostasia Foundation                                              |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Board members should be offered a reasonable stipend for their participation, above and beyond travel expenses, and this should not be limited to members from developing countries. Otherwise, many civil society participants will be unable to devote the time required to contribute, and participation will skew towards those who are independently wealthy or who are supported by industry or government. Facebook receives a benefit from their labor and it is not equitable for this to be performed without reasonable remuneration.

## Decisions

### ESSAY TEXT

There should not be an automatic right to have every appeal escalated for a further review. This option should only be enabled in certain cases where the subject of the appeal has been identified as of broader interest. This identification could be based on statistical analysis of other appeals. For example if a pattern of appeals related to transphobia has been established, this could trigger the availability of a request for review by the Oversight Board.

## Governance

### ESSAY TEXT

I have suggested that the Internet Governance Forum (IGF) would be an appropriate institutional home for the Oversight Board, though I don't underestimate the challenges involved. I am a member of the IGF's Multistakeholder Advisory Group (MAG) myself, and there are many people there who would like to see the IGF becoming more relevant. If it became the institutional home for the Oversight Board, this could provide benefits to both the IGF and to Facebook, and in particular it would make it easier for other social media companies to leverage the same institutional structure without reinventing the wheel. I can introduce you to the Chair of the MAG to discuss the opportunities and challenges of this option.

| RESPONSE ID                                    | COUNTRY                                                              | ORIGINAL LANGUAGE |
|------------------------------------------------|----------------------------------------------------------------------|-------------------|
| R_sckXDTQxsplMq1r                              | United States of America                                             | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                   |                   |
|                                                | No                                                                   |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                                 |                   |
| Yes, my essay responses may be shared publicly | No, my name and/or organization may not be attributed to my response |                   |

## Membership

### ESSAY TEXT

Once the areas of expertise have been established, within each of those areas the proposed board member should be validated by at least 5 other people from that same area of expertise. I don't think there need to be requirements like minimum number of years that someone has experience, but they should be viewed by peers as being representative of that demographic. Initially for the selection process, I would look to a variety of industry and nonprofit organizations to submit names. A small group of people from each area of expertise could vet the candidates, but perhaps a larger group of people from that same area of expertise could vote on who ends up being the board member. I'm not sure opening it up to the public adds value - most people aren't going to take the time to thoroughly research each candidate, and there's a significant likelihood of preexisting bias or negative media coverage influencing outcomes. The final selection should be made with a more thoughtful approach rather than a fully "democratic" approach. Perhaps, if you want to give the general public the opportunity to protest the selection of a particular board member, you could open up some sort of petition process and then consider it on a case by case basis (combined with the opinions of the other board members). On an ongoing basis, perhaps a smaller group of people from each area of expertise would be involved in the nomination, vetting and selection of future candidates, but there should always be multiple people involved in the selection of the person who will theoretically represent a demographic. I think termination should only occur when someone has violated the law or failed to disclose a conflict of interest. Terms of agreement should focus on engaging in civil debate, protecting the privacy of parties involved, and not using this position for financial gain.

## Decisions

### ESSAY TEXT

In an ideal world, this Oversight Board would eventually work itself out of a job. If enough of the right cases are reviewed over the period of a few years, and Facebook can adequately alter its Community Standards to better govern the platform, it might end up being redundant to continue bringing cases of a similar nature to the board. To that end, I think cases should be selected mostly based on their impact on a demographic, and less on random one-off cases that are specific to an individual situation. In the beginning, there will probably be a wide range and mix of cases as it relates to issues, impact, etc. - and that's fine - but the trend over time should be for the "machine" to learn from this process so that future decision making doesn't require as much involvement from the board. Anyone should be able to request review - at least in the beginning. For people to trust this process, it's going to need to be extremely democratic and open in the beginning. Maybe over time the criteria for review is narrowed so that it isn't as easy to file an appeal - especially in areas where situations have been consistently ruled as violations by the board. But in the beginning, for Facebook to be seen as credibly engaging in this process, I would err on the side of more rather than less review. Maybe that means the initial Oversight Board is bigger, and then over time adjustments can be made to make the board smaller if needed. This entire process should be about setting precedent and having an influence on Facebook rules and policies. If Facebook isn't learning and fine tuning along the way, then why even establish this process at all? Once the Board has made a decision, implementation should be immediate. I would approach the decision-making process similar to how the Supreme Court approaches decisions. Allow for a majority decision but also allow for dissent. I don't think you need to



make every part of the review and discussion process public, but publication of final decisions and dissenting views might help legitimize the process without giving people more detail than they need. Last, for case presentation, even though I just suggested mirroring the process after the Supreme Court, I also don't think this is a process that should require a user to hire lawyers or other outside counsel/support to appeal a case. Most cases should be decided based on the content that was originally posted - requiring the user to submit a bunch of additional information is probably excessive. However, a user should be able to present examples of other similar content that was not removed, give legal precedent if it exists, and generate limited third party support for their case. What I would NOT do is create a process where the appealing users need to launch a massive PR or social media campaign to build support for their appeal. This process should be more intellectual in nature.

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## Governance

### ESSAY TEXT

I do think Board members should be compensated by Facebook. This process - at least in the beginning - is probably going to require a significant time investment. In order to get quality Board members from diverse backgrounds, there should be compensation and it should be an equal rate for all board members. Also, no one owes volunteer time to a for-profit company like Facebook, regardless of how much they believe in the ideology they might be representing. This is a problem Facebook created for itself by creating the platform that it has developed, so Facebook should be solely responsible for paying people. I don't have an opinion about staff compensation. In my mind, those are just Facebook employees and they should be compensated according to standard Facebook company salary requirements. I think there would be value in tasking a handful of nonprofits and educational institutions to oversee the Board. I think transparency should exist on a few different levels. What the general public sees doesn't necessarily need to be the same as what each panel sees vs what the entire board sees vs what Facebook employees see vs what a governing board might see. Adjust it accordingly. Giving everyone access to everything feels like overkill that doesn't really make the process any better. With that said, have some flexibility to release more or less information on a case by case basis, depending on sensitivities involved. Quarterly public reports seem sufficient. More than that seems like more information than people want or need. Less than that makes it seem like there's a transparency problem. Facebook should implement all Board decisions immediately. There should not be any delay. Facebook staff should be available to support the board 24/7 and open communication is fine, as long as Facebook staff aren't involved in the debate and decision making process.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_Tt0wVHxEKYki0ff                              | Philippines                                                       | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Janette Toral                                  | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Membership criteria - they must be representative of various age groups, gender, and nationality. Selection process - Must also be representative of the Facebook community population. Termination - When a board member acts/decide where there is clear bias - favoring one party or another - because of his or her relationship with the parties/ subject in question. Terms of agreement for board members. 1. Time - commitment and including turnaround for deciding on cases. 2. No bias - refrain from voting/ commenting on cases where they are personally familiar about the parties in question.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_vHwNZbx49r9M3qp                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Gaurav Laroia                                  | Yes                                                               |                   |
| ORGANIZATION TYPE                              | ORGANIZATION NAME                                                 |                   |
| Privacy or digital rights organization         | Free Press                                                        |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

\*Free Press is submitting our comment in sections. The whole comment is available here:

[https://www.freepress.net/sites/default/files/2019-05/Facebook\\_Oversight\\_Board\\_Comments.pdf](https://www.freepress.net/sites/default/files/2019-05/Facebook_Oversight_Board_Comments.pdf)

Free Press Comments on Facebook Oversight Board In late January, Facebook outlined its vision for an independent Oversight Board that “creates accountability and oversight of [its] content policy and enforcement decisions.” Then in April, Facebook announced a process similar to “notice and comment” to solicit input about the governance, membership and types of decisions made by the Oversight Board. Free Press welcomes Facebook’s attempt at openness and transparency. Facebook’s initiating this public comment process on its Oversight Board for content moderation was a worthwhile step. However, this process falls short. It is not nearly iterative enough, nor transparent enough, to provide any legitimacy to whatever institution the company is seeking to create. Not only is the process problematic, the current proposal for the Oversight Board is also fundamentally flawed. The concept of an Oversight Board is meaningless if Facebook’s internal procedures and policies are less-than-transparent and result in disparate impacts for racial, religious, and other minorities and marginalized communities all across the globe. If Facebook is still enamored with the concept of an independent Oversight Board, it should go beyond just adjudicating “tough” content decisions and instead empower the board to audit Facebook’s internal processes to recommend policy, enforcement and transparency changes that should be implemented in order to lead to meaningful change. After careful consideration of Facebook’s current proposal for an Oversight Board and the questions Facebook posed for public comment, we strongly recommend that the company shelve this idea and return to the drawing board to propose an oversight body empowered to make real change. The Process We have years of experience with public comment processes. The notice-and-comment process Facebook is trying to emulate should be an iterative and open one. For example, U.S. government agencies issue proposals, seek public comment, and then further refine their proposals based on those comments. The comments themselves are posted publicly in an open and transparent manner. Facebook has provided none of these things. We have based this comment on the draft charter but have little idea if that truly reflects the company’s vision. We know generally that Facebook has had consultations with academics, interest groups, and civil-society organizations around the world. Yet we have little idea about whom exactly at Facebook these groups met with, the issues discussed in those consultations, and how the company will weigh those comments. Facebook has also confirmed that it will not publish comments submitted in this process and instead will have a law firm summarize the submissions. However, it is unclear whether the final makeup of the Oversight Board will reflect a consensus view of the comments, whether the initial proposal was panned or praised, or whether the company will ultimately go its own way and rest on the laurels of having had a process to give a veneer of legitimacy to plans it already had in place.

# Decisions

## ESSAY TEXT

Further Questions Nevertheless, if the project of creating this Board goes forward we raise the following issues: The governance, independent judgment and accountability of the Oversight Board are concepts inextricably linked to the types of decisions the Board is able to make, review and deliberate. Ensuring the Oversight Board's independence is critical — yet that independence will mean nothing if Facebook staff is so far removed from the decisions that it could easily ignore the recommendations and/or fail to enforce the outcomes, or if implementing those decisions is regularly frustrated by the actions and decisions of the company's leadership. Permanent staff will be necessary to help administer and support the Board. They must have the knowledge, training and historical context to advise the Board members of established Facebook procedures. Their support will be critical to making the Board function, yet the logistics of a global Board makes creating these supporting structures complicated. Examining the questions posed by Facebook's survey also leads to more questions than answers. Here are a few that Facebook needs to answer itself before this process moves forward: What kind of questions will go to the Board? Will they be policy issues or individual take-down requests or disputes? Will board opinions bind or merely inform the policy staff of Facebook? Will there be written explanation of the Board's decisions? Will there be published dissenting opinions? How will the decisions of the Board trickle down to users? How will the decisions of the Board trickle down to first-line content moderators? Is Facebook trying to have one speech/content policy for the world? How will these decisions be mindful of local contexts, cultures, norms and laws? What will the tipping point be for an issue to be considered by the the Board? When and how will users be notified of the a decision or moments in the cycle of the appeals process? When and how will a decision go into effect? What will the scope of remedies be for users? Will the scope of the Board include private or community groups? Will the Board adjudicate or recommend user bans? Will decisions of the Board affect other Facebook products like Instagram? What will the civil rights and human rights training and processes of the Board be? How will the permanent staff of the Board be picked? What's the training process for the Board? Who will lead it? Who will have input on the Board's training materials? Will Board members be paid? How can a 40-person, part-time Board adjudicate content decisions for 2.3 billion people? Facebook's current internal processes on content moderation have failed. The company must fix those first before creating this Board. Users do not know how those processes work, whether those decisions are internally consistent, or how the appeals process works. Users need real rights, reflected in the company's governance structure, to have confidence in the company, not just a promise that they might avail themselves of a new external bureaucratic process that leads to nowhere. Facebook should stop trying to pantomime government and instead try to be a responsible corporate citizen. It should work to improve enforcement, transparency, accountability, its appeals process, and its record on civil and human rights. And it should take a principled stand on its own content-moderation policies and community standards instead of hiding behind the veneer of a supposed independent Oversight Board — especially one for which it has not yet guaranteed either independence or authority. Respectfully Submitted, /s/ Gaurav Laroia and Carmen Scurato Gaurav Laroia, Policy Counsel Carmen Scurato Senior Policy Counsel Free Press 1025 Connecticut Avenue, NW Suite 1110 Washington, DC 20036 202-265-1490 May 13, 2019

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# Governance

## ESSAY TEXT

The Board The draft charter outlines a plan to create a one-size-fits-all global content moderation scheme through a quasi-judicial process — in effect creating a “Supreme Court” for content moderation. This plan is unlikely to work. Judicial processes are complex and often adversarial. They are fundamentally about giving people a venue to vindicate their rights. Facebook has not yet done the work of explaining the rights of its users vis-a-vis the platform or what the rules truly are. A judiciary cannot meaningfully operate in this fog. Establishing the rule of law and even crafting social policy through judicial review is an extremely difficult task within a responsive government context and perhaps impossible inside a top-down corporate structure. We are concerned that as a quasi-judicial body, the Board's independence and power will be illusory. It may never have enough power to meaningfully constrain the actions of the company's corporate leadership, bind the company to its decisions, or, we suspect, steer the company's policies in a way that conflicts with the company's profit motives. The Board as imagined by the draft charter seems designed to offload responsibility for its content moderation policies to part-time committee members instead of the company itself. The company should be honest about the powers and responsibilities the Oversight Board can reasonably expect to have. An independent advisory and investigative body avoids these pratfalls. Were the Board empowered to dig into the company's processes and publicly air its findings on Facebook's content-moderation policies and examine disparate impacts on marginalized populations, we might welcome it. But we have not heard such a proposal from the company. Facebook should adopt efforts like the model corporate policies laid out by the Change the Terms coalition, of which Free Press is a

member, which would be a step in the right direction to tighten up Facebook's internal processes on content moderation. Specifically, the Change the Terms framework rightly demands that Facebook apply an intersectional racial justice lens to content moderation to ensure that those most marginalized in our societies have their speech protected, and that those engaged in hateful activities come under greater scrutiny. The hard work of creating transparent, just and effective content-moderation policies needs deep involvement from within Facebook — and accountability must come from its corporate board and its C-suite — for the public to have confidence that Facebook is taking this task seriously.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_Xnvf1j4TYIbTEUV                              | United States of America                                          | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Andrew Jay Schwartzman; Mark MacCarthy         | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

We largely concur with the suggested approach to membership. It is essential that every aspect of the process be fully transparent. One important omission from the proposal is creation of a rotation in board membership. Thus, if the initial term is three years, the terms of the first members should be one, two and three years, selected by lot. One-third of the members' terms would expire annually thereafter. (If there is an automatic renewal, this mechanism should be adjusted accordingly.) Renewal, even if "automatic," creates an incentive to sacrifice independence in the hope of making sure that the term is renewed. A longer, non-renewable term might be a better approach. While forty members seems to be a good choice for domestic U.S. purposes, the plan appears to be to contemplate "global experts," in which case forty members may be too small to address the diversity of affected legal and cultural systems. It might be better to have several forty member boards to cover different regions. This, does however, create a new difficulty, as it would require some global supervisory board to assure consistency among the regions. While it is appropriate for Facebook to take a major role in nominating initial nominations, it should also accept nominations, including self-nominations, from the general public. Once Facebook establishes membership criteria, the board will have greater credibility if initial selection is delegated to trusted outside experts. Facebook should be able to nominate members, but this process must be transparent. It should also be able to veto proposed members, so long as reasons for doing so are fully and publicly explained. A board supermajority should be able to expel a disruptive or non-compliant member. Facebook should be able to remove members who violate terms of appointment. Reasons for removal should be explained publicly.

## Decisions

### ESSAY TEXT

We concur with most of Facebook's suggestions. To minimize inappropriate influence, in person panel meetings should not be in Facebook facilities and panel members should be discouraged from social encounters with Facebook staff. Panel members should be required to enumerate their professional and personal associations and interests and must disclose any possible conflicts of interest when considering a case. The U.S. Supreme Court process can be a useful basic model. Like certiorari, a minimum vote should determine whether most issues are heard. Like original jurisdiction, Facebook can itself present an issue to the board for mandatory consideration. However, like U.S. Circuit courts, it will be necessary to have an en banc mechanism or a small Supreme Court body to make final decisions on especially important issues and to resolve inconsistencies between panels addressing similar issues. While we suggest using U.S. courts for establishing procedures, we stress that the board's substantive actions should not be based on, or limited by, U.S. or any other national body of law. International human rights law should be used to establish basic guiding principles. Facebook may wish to specify that each subpanel have certain diversity requirements. Prior decisions should be given great weight, but should not be binding precedent for future panels. The board's recommendations must not be constrained by Facebook's then-current rules and policies. It should be able to recommend changes. Interested parties' submissions should be publicly available, subject to narrowly tailored redactions to protect personal privacy and trade secrets. As with the governance issues discussed in Essay 2, there must be transparency in decisions, opportunities for additional panelist statements and dissent, and disclosure of communications with Facebook. Similarly, Facebook must report actions taken in response to decisions.

# Governance

## ESSAY TEXT

Facebook must publicly acknowledge that this endeavor requires major changes in corporate culture and that it must cede control over functions that it has historically self-managed. It should expressly state its commitment to making such changes. Panelists' decisionmaking must not be influenced by their compensation. Many journalism ombuds have contracts for fixed terms, and they are fully paid even if they resign or are removed. Removed members' compensation could be determined by arbitration. A self-governing board will have greater credibility. It should not be an industry-associated body or trade association. The Center for Copyright Information and MPAA ratings models have imperfections, but these and similar mechanisms can be starting points. They are preferable to industry-created bodies such as NARB or TRUSTe. Facebook should fully fund operations based on a budget suggested by the governing body and should give a public explanation for reducing or modifying a budget submission. Delegating operation to a university with a long term contract would be workable. However, "think tanks" and other groups that engage in policy advocacy of any kind are unsuitable for this purpose. Transparency in governance is a given. This should include recording of oral and written communications between Facebook and the board and staff. The FCC's ex parte process can be a useful model. The governing body should issue quarterly reports, with the right to issue public statements or reports whenever circumstances require. Dissenting members should be able to issue statements explaining the basis of their dissent. The body should have the right to seek access to internal decisionmakers and procedures at Facebook, subject to appropriate non-disclosure requirements, but the governing body should be able to make public statements with respect to instances in which it believes confidentiality provisions are being abused. Facebook should be required to respond to recommendations or decisions under deadlines established, after consultation, by the board.

| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_yCPOjYX7w3tW9S9                              | Mexico                                                            | Spanish           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Eduardo Velázquez                              | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Within the conditions of rescission, the following aspects should be taken into consideration (including but not limited to): - Non-compliances with the code of conduct/action of the members of the board -Conflicts of interest -Requests or complaints made by organisations and/or the public vs. any member of the board -The termination of the membership. From the above, it would be appropriate to inform the public and other interested parties of the reasons for the termination. The terms of agreement for board members could consider, among others: -Confidentiality during the review of the cases designated to each panel, thus avoiding bias in the final decision or result – Agreement on the preparation of reports, either weekly or monthly, for each panel and that are included in the final reports of the board for its final publication - That all board members sign and adhere to the code of conduct and/or action established, and where it is specified that any breach will be subject to evaluation and the corresponding penalty will be received. - That the decisions taken by the board members, even if they have been supported through consultation with expert organisations or individuals, are not influenced by the views or opinions of the latter, that is, that the impartiality of the members is guaranteed.

## Decisions

### ESSAY TEXT

The criteria for the selection of cases could be established according to the following: Categories (such as): -Videos -Photographs -live streams (live broadcasts) -Extremist groups, which incite hatred, discrimination, misogyny, etc. \* Prioritise those posts that are denounced or reported by a high number of users. \*Include random reviews for content that is not reported by a large number of users but that have at least one report, to cover a broader scope of review, the above in understanding that reviewing each and every content with at least one report represents an enormous amount of work and is not appropriate. \*Perform periodic (weekly) trending topics and/or popular hashtags reviews, and/or those already having a history of being linked with sensitive or inappropriate content. The users whose content is reported may have the right to replicate/review in cases, for example, of original or artistic content, and for content that violates the platform policies and guidelines, the non-revision of such content shall prevail. The board, in its overseeing capacity, should make recommendations for improving Facebook policies and guidelines. Should the suggestions or improvements be accepted, the board must at all times monitor that said suggestions or improvements are implemented at the times to which the area/areas, as appropriate, have committed. After implementation, and in the event of an impact on the platform user, the board should manage the publication and/or notification to users within no more than 72 hours as of the implementation thereof.



| RESPONSE ID                                    | COUNTRY                                                           | ORIGINAL LANGUAGE |
|------------------------------------------------|-------------------------------------------------------------------|-------------------|
| R_yPxREZC2N9Hm7T                               | Brazil                                                            | English           |
| RESPONDENT NAME                                | RESPONSE ON BEHALF OF ORGANIZATION                                |                   |
| Prof. Dr. Fabricio B. Pasquot Polido, LL.M.    | No                                                                |                   |
| CONSENT TO SHARE                               | CONSENT TO ATTRIBUTE                                              |                   |
| Yes, my essay responses may be shared publicly | Yes, my name and/or organization may be attributed to my response |                   |

## Membership

### ESSAY TEXT

Facebook has proposed an Oversight Board of experts with experience in content, privacy, free expression, human rights, journalism, civil rights, safety, law, and other relevant disciplines. The list of members will always be public. The Board will be supported by full-time staff, which will serve the Board and ensure that its decisions are implemented. The staff will not form part of the Board itself. Regarding Board membership, we would welcome comments on issues such as: \* Appropriate criteria for membership \* Selection process (both initial and future) \* Conditions for termination \* Terms of agreement for Board members

First of all, it seems important to recall that the proposed Oversight Board shall gather a group of people who are responsible for making sure that an activity is done correctly and legally done within the community and also ensure that the responses or actions in relation to the activities overseen will be also conducive with transparency, accountability and consistency. I believe that these first assumption may reveal that an appropriate criteria for membership (the composition of the board itself) should not rely solely on criteria based on seniority or specialization. For instance, FB would not go mainly for ‘professions’, where basically senior engineers, computer scientists, journalists, retired judges/prosecutors and senior lawyers would have positions in such board. Rather, the OB membership criteria should be designed to comprise a set of professionals having different and interdisciplinary backgrounds, ages, nationalities, cultural and political views so to ensure the exchange of opinions, expertise and reactions/engagements in relation to the targeted activities – content governance and enforcement – and above all- knowledge about the specificities and operation of the FB community of users. Going back to profession, like legal practitioners (which would go back to a closest example of comparison and my possible scholarly scrutiny), traditional legal education and practice (almost impregnated by blackletter law/doctrinal views, overspread in several countries worldwide, in common/civil law traditions), will likely frustrate the main objectives of the proposed OB. Traditional judges and lawyers occupying advisory or oversight boards usually tend to focus more on the ‘object’(subject matter in dispute) then to make efforts to better understand and decode the nuances of the main disagreements and conflicts between “subjects” (individuals, companies, organizations, governments) and the contexts involved (societal, environmental, technological and community approaches). It might be interesting to rely on panelists having recognised work in areas related to the activities (content governance and enforcement) and subjects, such as users/individuals and specific targeted groups. Some targeted groups, such as black communities, native/indigenous, scientists, environmentalists, LGBTQs are exponentially becoming marginalised by deliberate action of extremist political views/partisans in social networks and platforms. Those acts also affect internet companies, including SMEs, and governments as well. Therefore, academic background, innovative and critically oriented work in connection with governments, practitioners, civil society organisations and multistakeholder representation would be very suitable for the establishment of OB membership criteria. Like any other company carrying out activities in large IT and internet industries, Facebook responds daily to social and political challenges deriving from dynamics of innovation and use of news technologies on global scale. If the board is to oversee content moderation activities carried out by FB (including errors and externalities generated by human actions and autonomous/intelligent systems), it appears obvious that the OB have to face those challenges accordingly. In addition, with regard to specific personal skills /academic and professional background, one could remark that there are many areas of expertise involved in proceedings involving appeal to content moderation in concrete. They are not only based on privacy, social media, freedom of expression, human rights, safety or “hard” legal issues which somehow could be biased by pure ‘lawyering’ behavior. They also comprise, for instance, overarching issues related to recognition and empowerment of local communities, internet governance principles, the profiles and constituency of cross-border

internet conflicts (particularly in those cases where inevitably the decision made by panel and the Board itself could be subsequently challenged before domestic state courts, and the concern therefore would also touch further issues on jurisdiction, due process/procedural fairness, cooperation with international/regional and domestic courts). I suggest an authentic blend of knowledges, expertise, cultural/social diversity and gender balanced composition able to mutually make each Board member to take informed decisions and to share experiences and points of view. In a preliminary/first appointments made by FB, it seems feasible to design and run a selection process based on appointments, recommendations or applications based on specific criteria, such as individuals with experience/expertise/knowledge in the related fields to the activity of the proposed OB (such as in public policy formulation/lawmaking process, scholars, specialists in IT and internet industry, law clinics, civil society engagement, legal assistance in cases related to internet). These individuals would be less exposed to bias or lobbying, being able to strike the necessary balance between public and private interests, such as those vested in existing and emerging/future conflicts between freedom of expression, privacy and freedom of business – which are, in my view, basically the most visible stakes when internet dealings and related interactions are into consideration. But they do not exhaust the social, political and ethical disagreements amongst users, platforms and autonomous and intelligent systems (where one should remark that this also about AI related mechanisms doing content moderation), particularly where historical, political e social issues in certain countries and societal contexts are into consideration. Secondly, it is important that Members have commitments to community/users' stakes, which may be significant not only by means of understanding and engaging with the other's/user arguments, interests/stakes, concerns, fears (in a process derived by knowledge and recognition). Purely nomination/appointments by peers may also not resolve the representation issue at Board level. As it happens, for example, in arbitration/DRSs' industry, nominations for list of arbitrators in arbitral institutions tend to be, in certain cases, biased and circumscribed by the interests of law firms and arbitrators. This is how arbitration industry operates nowadays in the most active dispute resolution centres worldwide and this model should be completely avoided by FB, in particular due to the public concerns involved in content governance and enforcement. The same applies to judges in higher/appeal courts in some countries where the appointment system based on seniority (within the judicial career/body) coexists with political appointments between different divisions of Judiciary power. I would like to highlight here that my opinion here is fully supported by a comprehensive material available in constitutional/procedural legal and sociolegal scholarship.

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## Decisions

### ESSAY TEXT

I would like to draw a comparable example, but surely subject to several limitations with regard to the proposed Facebook OB. Like it occurs with the structure, functioning and powers of courts or oversight/supervisory bodies, there are three overarching conceptual frameworks which are undissociated for institutional designs – independence, jurisdiction and procedural fairness. Once combined, they underpin the vested power of the court/body to take decisions and enforce them in a legitimate fashion and also comply with the citizens' expectations and rights in relation to being respected in procedural guarantees and voices. Impartiality follows as an indissociable feature from any decision-making role in democratic environments. In all societies/communities relying on legal systems, in their narratives and codes based on the rule of law, for instance, independent courts are able to check the previous and ongoing executive and legislative actions and powers by the fact that those courts are independent from other powers/branches. Court's members have to enjoy an adequate degree of discretion in deciding cases or providing solution for contentious situations. In my view, any decision from FB to establish an OB – even here recognising the difficulties and cultural resistances that the initiative could generally suggest- shall be guided by those conceptual frameworks and principles. Said frameworks and principles may approximate the OB structure, operation and decision/review powers to other institutions in democratic societies and also allow OB to engage in a proficient exercise with distinct 'functional regimes' related to social media and content governance. I could mention many of them, like international human rights and human rights enforcement (which comprises, in any case, the respect to freedom of expression, civil liberties, privacy, right to disconnection, protection of vulnerable groups/minorities etc.), safety (human/populations, food, environmental, biological/genetical) and internet governance itself. I am resorting to those examples of 'intersecting' or 'interacting' regimes- human rights, safety and internet governance-, since content moderation activities as currently carried out by many stakeholders /economic agents in IT, internet industries (or even in media and entertainment) affect interests and legitimate expectations related to different stakeholders within and outside those regimes/orders. Furthermore, I would remark here some positive features for achieving independence in case of the creation of an OB: (A) independence from the creating entity (which means no corporate/employment relationship with FB); (B) desirably independent funding scheme from FB corporate structure (or alike, such as FB fund/trust designed to the OB; or endowment actionable for OB activities related to content moderation; or in a more sophisticated model, a global fund compliant with strict independence and neutrality guidelines for those who are funding or sponsoring, with financial resources that can also derive from debt collection or reallocation of damages or fines/or in connection with judicial or administrative litigation involving FB and Law Enforcement

Agencies in cases before domestic courts (what I could formulate further, a sort of “reversible fund” to support activities of the OB and justifiable where civil society and collective/public interests are involved). But all those alternatives would inevitably depend on the construction of cooperative dialogues between FB, government and civil society, although I strong defend that this approximation is always necessary to support joint initiatives, particularly where public concerns are involved and they also may ensure that the internet governance principles are not undermined by authoritarian and deleterious actions; (C) discretionary power to pick up the relevant cases with global repercussion that can be scrutinized at content moderation appeal level (as it occurs, for example, in judicial/adjudicatory systems, where courts have discretion to select the cases which are eligible to be settled under judicial review or under certain grounds of appeal); and (D) relationship and compliance with rules and principles. The last feature, I contend, allows the proposed - independent and accountable- OB to adhere to a set of principles, values and procedural rules, which can be written in basic document/code/standards. FB, by its turn, has to expressly adhere with the document in order to express its obligation to not interfere with both the authority of the OB and its members’ activities and decisions. This joint commitment/adherence may also generate several associated outputs in terms of implementation and respect of human rights by state and non-state actors, such as the case of FB, and also to stick to values and compliance with democratic patterns and be able to respond to societal changes. Also ‘rules of procedure’ have to be strictly

A collection of white papers, academic articles, and statements which were issued since the release of the Draft Charter. This list may not be entirely exhaustive, as academics, civil society organizations, and others continue to comment on the proposed Oversight Board.

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3365358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365358)

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[https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero\\_report\\_2\\_2019\\_facebook\\_charter.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_2_2019_facebook_charter.pdf)

*Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*. Letter to Mark Zuckerberg from David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Reference: OL OTH 24/19, May 1, 2019.

[https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL\\_OTH\\_01\\_05\\_19.pdf](https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_OTH_01_05_19.pdf)

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John Samples, "Who Should Moderate Content at Facebook?," CATO Institute, December 18, 2018.  
<https://www.cato.org/blog/who-should-moderate-content-facebook>

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The following papers were also shared with Facebook, but are not available through existing links. Thus, they are reprinted here in full. These have not been edited by Facebook.

Noah Feldman, *A Supreme Court for Facebook* (January 1, 2018).

## A Supreme Court for Facebook

Noah Feldman

1-30-18

Free speech is deeply endangered in the age of social media. The only solution is for the platforms that shape so much of today's communication to double down on their own commitment the freedom of expression.

And the best way for them to do that is by setting up their own quasi-legal systems where clearly stated policy rules can be applied to the plethora of real-world expression challenges that the companies face. To put it simply: we need a Supreme Court of Facebook.

The dangers that social media platforms pose to free speech come in many forms. One hard-to-measure impact is the background assumption by digital natives that they should be able to block real-world speech they don't like – the same way they block or are shielded from undesirable expression on line.

But the most pressing threat is the pressure that the platforms face to limit expression in order to satisfy engaged, committed advocacy groups.

There's nothing inherently wrong with urging private companies to regulate offensive or potentially dangerous speech. The problem is the asymmetry between those who seek censorship and those who favor freedom. Those calling for restricting speech tend to be highly motivated, focused on their issue of choice, whether it be racist speech or sexist speech or just speech they really believe should not exist. Yet those who favor free speech typically hold that interest in a more diffuse way. They believe in freedom of expression for everybody, but are not specifically concentrated on any particular utterance or viewpoint.

In a lobbying battle between a concentrated group and a diffuse interest, the concentrated advocacy group almost always wins. That's the secret of numerous powerful advocacy groups in American politics, from the National Rifle Association to Mothers Against Drunk Driving to advocates focused on Cuba or Israel.

So when advocates pressure Facebook or Google or Twitter to ban certain speech, they have a good chance of getting through to the companies. No one is pushing hard on the other side of the door.

In a world where vast quantities of expression, both personal and political, occur on social media, this means the new, virtual public square will increasingly not be like the old, real-world one. Free speech will take a back seat to content-based restriction, with unpopular or offensive speech coming in for the most regulation.

Fortunately, there is a solution, one borrowed from the free-speech lessons experienced by governments over the last hundred years. The principle of free expression can be adopted officially and formally as a constitutional rule, the way it is in all democracies. Then the limits on expression – and some limits on speech are necessary in every free society -- can be worked out through a public, reasoned process of argument, resolution, and evolution.

This solution has worked because making free speech into a fundamental rule changes the default result when advocates seek to limit speech. Faced with such demands, a legislature would almost always say yes. The courts, however, can say no. And their “no” is informed by their commitment to the greater principle of free expression. As keepers of the basic right, the courts have become an effective counterweight to censorship.

The U.S. government can’t play that role for U.S.-based companies, because those companies are themselves entitled to the freedom of speech. Legally, that means the government can’t impose limits on what Facebook or Google choose to allow on their platforms. What they choose to allow is itself an expression of their own First Amendment rights.

That leaves it to the platforms themselves to act like governments and establish the private equivalent of a constitutional principle of expression. Doing so will enable them to tell their users – and the rest of the world – that they stand for free expression not just when there is no one to tell them otherwise, but at the level of principle.

Fortunately, free expression is already consistent with the platforms’ values and mission. With 2 billion plus users, Facebook is the widest reaching vehicle for self-expression the world has ever known. Google’s search engine is the most powerful and widely used tool for discovering and disseminating information invented in centuries, on par with the printing press and maybe even writing itself.

To be sure, the platforms’ versions of free expression would not be identical to the one adopted by the U.S. Supreme Court. The near-absolutism of the contemporary court’s First Amendment jurisprudence makes the U.S. a free-speech outlier.

Facebook already restricts some forms nudity and hate speech. Its policies may end up looking more like free expression in some Western European countries, or in the U.S. of the 1950s. And that’s just fine, because Facebook doesn’t control all speech, and there will remain other venues for hate speech, pornography, and the like. Google, for its part, would probably adopt a broader version of free expression for its search business, even if it chose a similarly limited one for its social media businesses.

The key to making this private-courts approach work is recognizing that there is no magic-bullet solution to balancing competing values of free expression, safety, and equality. The advantage enjoyed by real-life constitutional courts is that they openly address difficult cases, and so derive credit and legitimacy from being principled. They make mistakes, and correct them. Their rules evolve with changing technology and ideas. And instead of blaming them for this, we mostly validate their efforts.

Right now, the platforms are already doing plenty of balancing work. But they aren’t doing it transparently or in a legal-logical way. Changes are greeted with outrage rather than respectful engagement.

All that could change if the platforms provided a forum for argument, openly considered opposing views, and announced the reasoning behind their decisions on a case-by-case basis. Their private “courts” would be borrowing some of the legitimacy of public courts – but also, over time, adding to the broader discourse around free expression. They could cite judicial opinions from different countries as persuasive authority. It’s easy to imagine that if they do their job right, real courts would eventually cite Facebook and Google opinions in return.

A further benefit of a quasi-legal approach is that it would give the platforms much greater authority in resisting the demands of countries who want them to restrict speech in ways they would prefer not to respect. Right now, the platforms must engage in a complex, unpublicized calculus about how and when they should obey local rules, sorting out potentially plausible ones (like the right to be forgotten demanded by Germany) from outrageous demands driven by autocracies’ efforts to suppress dissent. A public reasoning process by a court-like body would allow Facebook or Google to act the way real-world courts do when faced with competing international legal claims, openly weighing comity against justice.

There are plenty of details to be worked out. But no one should worry about private companies setting up their own courts. It's worth recalling that national legal systems themselves evolved from more private courts administered by notables or religious authorities.

Here is chance for the platforms to promote free expression globally, protect us from the potentially dangerous effects of their own unprecedented power, and act in the name of principle. If they don't do it, free expression will erode further -- and the consequences could be disastrous for the platforms as well as their users and everyone else.

## Facebook Supreme Court: A Governance Solution

Noah Feldman

This paper proposes a Facebook Supreme Court to protect and define free expression and association on Facebook. Along with a lower appeals court, the court would interpret and apply an iconic, one-sentence values commitment that Facebook would adopt.

The first aim is to balance the values of **free expression and association** with the sometimes competing values of **public safety, equal dignity, and community** in order to produce the best possible substantive decisions about content.

The second aim is to create a durable institution to deliver **principled, reasoned decision-making** that would be widely understood as **legitimate** and would be compatible with Facebook's values and its obligations to users and shareholders.

The Facebook courts would be composed of prominent, legally skilled, independent contractors from around the world, sitting above the existing Facebook content review team.

The courts' decisions and reasoning would be reported publicly and would develop into a coherent body of jurisprudence to ensure consistency, transparency, and predictability.

This proposal derives powerful lessons from the model of the constitutional courts that have arisen globally since World War II. **Independent** yet still **part of government**, they protect and balance a range of basic rights, among them expression and association.

The Facebook courts would emulate the following features of constitutional courts:

- Openly **acknowledge** and **balance competing values** within a framework of **principle**.
- Give interested parties an **opportunity to be heard**.
- Publicly **explain their reasons** for decision, including dissenting minority views.
- Decisions form a body of **precedent** that can be relied on in future cases.
- Judgments can **evolve** and change over time based on experience.
- Cases follow an **appeals process** that allows refinement of arguments.
- Ambit of courts' decision-making authority is **limited** and **well-defined**.
- Courts enjoy **independence within their defined sphere**.
- Decisions **can be overruled** by higher powers subject to defined mechanisms.
- Decisions enjoy broad and deep **public legitimacy independent of outcome**.

Because Facebook is a platform rather than a government, and because it operates transnationally rather than nationally, there will be important differences between the Facebook courts and existing constitutional courts. An analysis of the relation between Facebook and **sovereign states** in the light of the judicial model appears at the end of this paper.

## Values Commitment

### *Proposal*

Facebook should adopt a formal, concise, and public **values commitment** on freedom of expression and association. The commitment should control and guide the Facebook courts' decision-making as well as decisions by Facebook content reviewers and the design of automated tools that review content.



The text could read:

**Facebook commits itself to the values of free expression and free association, consistent with respect for public safety, equal dignity, community, and law.**

### *Rationale*

Facebook is already committed to the values of free expression and association for its users. This formula is intended to be consistent with Facebook's existing community standards.

Adopting one-sentence formal commitment provides a simple, easily recognized, and publicly accessible focal point for future discussion and decision-making.

The public is accustomed to free expression declarations, which appear in essentially every constitution as well as international declarations of rights.

And the public understands, at least implicitly, the function of such declarations: They define default commitments and values, while recognizing the reality of countervailing values and the necessity of balancing.

A single formula encourages **focus**, internally at Facebook and publicly, much better than a longer values statement or description of community standards. It is more likely to become **public** and even **iconic**. At the same time, a values commitment is **flexible** through interpretation.

The commitment as drafted recognizes the existence of values that may lead decision-makers to rule against expression under some circumstances. But it very specifically **restricts** the reasons for ruling against expression to public safety, equal dignity, and law. That is, Facebook commits itself not to decide against free expression for reasons extraneous to those given.

The commitment could, of course, be broken by Facebook. As a corporation, it has the right and capacity to change its policy at any time or even ignore it. The public understands this, as it should.

The reason the self-restriction should nonetheless be **meaningful and believable** is that the whole point of a values commitment is to bind whoever makes it to paying **the costs of any future violation**. That is, the future possible costs of breaking the commitment **are the reason** the commitment can be taken seriously in the present.

If Facebook were to violate its commitment, it would be subject to public censure and criticism. That potential criticism – and Facebook's desire to avoid it -- are necessary to making the commitment meaningful and more than symbolic.

### *Word-by-Word Explanation (Skip to “Institutions,” p.6, if you want to save time)*

**Values:** Calling free expression and association “values” rather than “rights” emphasizes that Facebook is not a government and does not confer or recognize “rights” against it in the way a government does.

This formula also does not limit itself to the interests of Facebook users. A narrowing could be accomplished by saying something like, “Facebook commits itself to its users’ free expression and free association...” The restriction would simplify future analysis. But it sounds parochial, especially given the scope of the Facebook user base. Facebook should be committed to these values for everyone, not merely users while they are using Facebook.

**Expression:** The term is intentionally broader than “speech” and encompasses the full range of ways people seek to communicate and connect using Facebook. It is also less U.S.-centric than “speech.”

**Association:** Freedom of association is sometimes thought to derive from free expression, but it represents an independent value. As a separate value, free association is especially relevant to Facebook's associational structure of voluntary friendships and groups.

It is important to explain and defend the right to association because over time, it is very likely that Facebook will face increasing pressure restrict or limit association: for example to prohibit discriminatory or exclusionary Facebook groups, or Facebook groups that correspond to membership in exclusionary associations.

**Consistent with:** Many values commitments globally include express balancing requirements. The phrase “consistent with” is intended to emphasize that there is no necessary contradiction between expression and association and the

other values, while acknowledging that contradiction is possible.

Above all, this formula does not dictate a hierarchy of values, which would be difficult conceptually and practically. It suggests the necessity of case-by-case balancing in the light of real-world concerns, interests, and values.

**Respect for:** The term “respect” identifies a need for modesty and deference – but not absolute deference. The balancing of values is not and cannot be purely mechanical. Invoking public safety, equal dignity, community, or law does not automatically outweigh free expression or association.

**Public safety:** This formula, borrowed from international law, permits and encourages Facebook to take into account those uses of expression and association that threaten physical harm to individuals or groups or promote public disorders such as riots or wars. All constitutional systems limit free expression in this way, albeit to differing degrees. The crucial importance of public safety is highlighted by what might be called the “Radio Mille Collines problem”: the danger that a group might use Facebook to coordinate a human rights violation, the way Hutu non-governmental actors used the radio station to motivate and coordinate the Rwandan genocide. Given the centrality of Facebook to political organization in countries with limited party infrastructure, this risk deserves to be taken seriously.

**Equal dignity:** This language should show that Facebook is *not* taking a position on all forms of equality, such as economic equality or cultural equality, but rather committing itself to the kind of equality that concerns the dignity of all persons. This is an extremely broadly shared values commitment, and I can think of no major religion, culture, or state that claims to reject it.

The word “human” is consciously avoided here in order to avoid discussion of whether dignity extends to non-human animals, future artificial intelligences, and the like.

**Community:** The term is used here to encapsulate what also might be called “decency” or “offensiveness” – particularly explicit sex-related content.

It is designed to capture Facebook’s already existing policies on such content, while allowing for the development of a more consistent jurisprudence. This seems particularly important in the light of the public criticism that Facebook’s current policies are inconsistent.

It is worth pausing to emphasize that definitions of indecency or obscenity are notoriously difficult (“I know it when I see it.”) The word “community” is functioning here as a euphemism; and euphemisms are in general to be avoided in values commitments.

There is also a separate problem of how community standards of decency vary from place to place and person to person. Whenever possible, therefore, it is *much* preferable from the standpoint of free expression to address decency by opt-in mechanisms that would allow the user to choose what sort of content to see.

Ideally, the values commitment would not even need to include a decency provision. It is included here because it is already present in existing Facebook policies, and because the values commitment should be consistent with those policies.

Nevertheless, a body of jurisprudence may evolve to render Facebook policy more consistent and defensible than how it is being depicted at present.

**Law:** This provision is included so that Facebook will be enabled to comply with local or national law without violating its core value. Nevertheless, it is not necessarily intended to be absolute. Three stylized options exist here:

1. “Respect” need not mean universal compliance with laws that are unjust or violate freedom of expression and association. Facebook could respect local law except when it violates its core value.
2. This provision, taken in a fairly absolute way, could alternatively be used to structure Facebook’s interaction with states that restrict content according to law. Facebook could, by adopting this language and a strict interpretation of it, make a general policy judgment that it will comply with lawful state-based demands to remove content. In this scenario, the Facebook court could decry or condemn a particular takedown order while simultaneously acknowledging that Facebook will comply.
3. It would be plausible to *eliminate this provision from the proposal altogether*. The idea would be to discourage states from enacting laws that limit expression and hence gaining control over content on

Facebook. In that case, the question of compliance with local law would be deferred more systematically to Facebook management as a case-by-case policy decision.

### *Limits and Omissions*

It is important to note what the values commitment *does not* cover. As formulated, it addresses situations where there is a proposal or a decision to limit or prohibit content posted by users to Facebook. It therefore *does not* directly address the complex question of how content should be prioritized in users' feeds.

It would certainly be logically possible to bring free-expression values to bear on this issue. For example, Facebook management could ask the Facebook courts for public, non-binding advisory opinions on proposed changes in order to help make the right decision in advance and create public legitimacy for changes.

But for now, at least, it seems desirable to **restrict this governance mechanism to the question of prohibiting or permitting content**, establishing the commitment's legitimacy in that restricted domain. This largely removes the values commitment from the realm of product policy.

## Institutions

### *Proposal*

The Facebook Supreme Court would sit at the top of a hierarchical structure of decision-making that begins with **three existing** tiers of review.

**Tier 1** Machine/algorithmic implementation of restriction policies

**Tier 2** Facebook lay contractors trained to implement Facebook values commitment

**Tier 3** Facebook content policy team, expert in balancing competing values

**Tier 4** Facebook Court: 45-199 (?) Independent, part-time, paid experts, spread globally to address hard cases

**Tier 5** Facebook Supreme Court: 11-45 (?) Independent, part-time, paid, globally recognized experts to address cases still appealed after tier 4

The proposed mechanism is intended to preserve existing technologies and content policy personnel who are already dedicated to an on-going practice of values balancing and decision-making. Tier 3, content policy review, is in fact already a complex, multi-tiered mechanism within Facebook. That existing structure should remain.

### **What is wholly new is tiers 4 and 5 – and their quasi-independent character.**

The structure of Tiers 4 and 5 is intended to provide opportunity for refinement of arguments and ideas in difficult cases. The existence of a possible appeal to the highest level is intended to create a greater sense of openness, revisability, and participation than would exist in a single tier judiciary. It is also intended to conserve the resources of the top tier for truly unusual and difficult cases.

### *Access to Reasons*

Facebook should ensure that every user who objects to the removal of content or seeks the removal of content is entitled to a reasoned explanation of the decision **if the user asks** for it. Typically, that explanation can be a **brief reference to the values commitment as applied to similar cases**. It can be generated quickly or even automatically in association with a machine “decision” or by a contractor making a high-speed determination in accordance with a rule.

### *Tier 3 Access and Reasoning*

Access to tier 3 review should depend on one of two routes: either a user requests further review, or Facebook staff at tiers 2 or 3 internally judge the case is close enough to require tier 3 review.

The explanation of decision at tier 3 should be slightly more elaborate: a sentence or a short paragraph expressing the content of the balancing that has occurred, or occasionally something longer at the discretion of the tier 3 reviewer. In order not to overwhelm tier 3, a user requesting review should be required to explain the user's ground for disagreeing with the tier 1 & 2 decision. The explanation should be word-limited but it should not be allowed to be cursory. This will improve the quality of decision-making and deter users who are not serious about seeking review.

### *Tier 4 Access and Reasoning*

Access to tier 4 should be restricted to cases where a user or state actor objects to the tier 3 decision and requests review. The barrier to access should be **considerably higher** here.

As in a court, the user seeking review should be **required to submit a substantive argument** disagreeing with the reasoning provided at tier 3. If there is a user or state actor on the other side, that party should also be able to submit an argument – an approach that is probably unnecessary at tier 3.

If a request is properly made, tier 4 review should be guaranteed.

The reason for decision at tier 4 should be substantially more elaborate. It should state a principle of decision sufficiently concrete to be useable as a future precedent in lower tiers of review. Tier 4 judges should recognize that their signed work product may be widely analyzed globally, and should write accordingly. Where possible, they should cite useful comparative decisions from constitutional courts. They should strive to harmonize lower-tier decision-making and to follow precedent created at the tier 4 level. Where judges disagree with tier 4 precedent, they should say so clearly and call for tier 5 review to change the precedent.

### *Tier 4 Personnel*

Tier 4 judges should not be Facebook employees. Rather, they should be paid, independent contractors with careers of their own, generally in law and (perhaps) legal scholarship or (sometimes) other analogous disciplines. Tier 4 judges should be on transparent, public contracts at a fixed, per-case rate comparable to what they would earn in their ordinary practices. The pay should be high enough to confer significant prestige, comparable to what senior lawyers are paid at major law firms.

The contracts should be for a fixed term, perhaps 3 years. They should be presumptively renewable several times based on a voted judgment by the entire body of judges that the particular judge is complying with the Facebook values commitment. A contract may be broken if a judge is deemed by a super-majority vote of the other judges not to be following the Facebook commitment or precedent.

Tier 4 judges should be well-known within their professions, but need not be publicly recognized figures. Their legitimacy will derive at first from their professional status and then from the work they do. They should be motivated to join the court in large part by the prestige of being invited to serve.

By choosing judges from within the legal profession, the design should minimize the temptation for actors to seek individual publicity by deviating strongly from the Facebook values commitment. Judges will not ordinarily be people whose professional norms encourage attention-seeking behavior that deviates from committed norms. Reputational effects will be important to them. They will be mid-career actors, so that they will have other interests and goals alongside their Facebook judicial position.

### *Tier 4 Global Reach and Grouping*

Tier 4 judges should ideally **come from around the globe**. Many will probably come from countries with highly developed legal cultures. But there should be strong geographic, cultural, and gender diversity.

It would be possible to organize judges into regional sub-panels of the tier 4 court to consider cases region by region. But I would **advise against regional sub-panels**.

The Facebook values commitment **should be universal** and applicable everywhere. Free expression and association are **universal values**. So are public safety and equal dignity. Community on Facebook is **transnational community**. This also avoids line-drawing exercises around borders and regions.

Sometimes, **locale-specific factual information** will be required to determine whether a claim to public safety should outweigh free expression or association. That can be **acquired through specialized Facebook tier 2 and 3 personnel** with area knowledge.

But it would **not be advisable to rely on regional judges** to have systematically better information. Indeed, local judges are more likely to share political preferences of some local actors that might interfere with independent judgment. Better to provide all local information to tier 4 decision-makers who may be from anywhere.

### *Tier 5 Access and Reasoning*

Access to tier 5 should probably be at the discretion of the Supreme Court so that numbers do not overwhelm. A group of dedicated court clerks – possibly fulltime employees -- could review all requests and recommend to the Court's members which should be considered.

The reasons for decision at tier 5 should be detailed enough to explain reasoning and serve as precedent. They should aim to harmonize decision-making at lower levels. The Court's decisions will be read and analyzed globally. They should cite relevant comparative precedent. Dissent is appropriate and will enhance the quality of decisions as well as public legitimacy.

### *Tier 5 Personnel*

Ideally, tier 5 judges should enjoy national or international public reputations within their professions. They could be of various ages and career stages, but they should **bring prestige to the Facebook Supreme Court** at least as much as they derive prestige from it. In some cases, they may be retired judges of constitutional or other courts or high-profile former government lawyers. They should reflect a broad political range and should come from a range of geographic and cultural backgrounds.

Tier 5 judges should not be fulltime Facebook employees but **independent contractors** subject to publicly transparent contracts. Their pay should be symbolically higher than tier 4. They will not need or seek further fame but will by virtue of their reputations be committed to rule-following and some degree of public profile management.

### *Decisional Panels*

Tier 4 should ordinarily hear cases in panels of 3 or 5. Tier 5 judges should sit in panels of 5-7. Those panels can be chosen at random or potentially with regional specificity.

Rarely or never should the courts sit as whole bodies. This will reduce their interest in grandstanding or self-interested, publicity-seeking action.

## **Rationale**

### *Rationale*

At present, Facebook does thoughtful, sophisticated, values-balancing on an internal basis – and receives insufficient public credit for its efforts. Facebook receives **little positive reinforcement** when it successfully **protects expression** or association or successfully bars undesirable content before anyone objects to it.

But it receives substantial **criticism when** (in the view of outsiders) **it over-protects or under-protects** the values of expression and association. And it receives criticism for **perceived inconsistency** in application of its policies.

This public-reception asymmetry is a product of ordinary interest-group politics. Those seeking to bar speech are issue-focused and concentrated. Those seeking to protect speech tend to be diffuse and not issue-focused.

Tiers 4 and 5 – the Facebook courts – will give **modest yet sustained salience** to Facebook's efforts to protect expression. Collectively, over time, the Facebook courts' decisions should create a new **jurisprudence of free expression** and association **that will be associated with Facebook**.

Some controversy and disagreement over the courts' decisions is inevitable. But even when it occurs, it will come in the context of the public understanding that Facebook is publicly and responsibly grappling with balancing values in cases that have no simple right answers. This repeated engagement should produce legitimacy for the decision process, and a new narrative for Facebook's engagement with these problems.

Ultimately, the underlying purpose of using a **judicial model** is to develop and present **principled answers** to difficult questions – and to be seen to have done so fairly and legitimately.

### *Independence*

Perhaps the most significant innovation in the Facebook courts proposal is the **model of judicial independence**. Constitutional courts are simultaneously **part of a state governance** structure and also **independent actors** within it. Similarly, the Facebook courts are named and branded as part of Facebook, and work as contractors *for* Facebook, while maintaining decisional independence.

This hybrid, judicial model is intended to **capture the legitimacy benefits of decisional independence** while maintaining the Facebook courts' association with Facebook and obligation to uphold Facebook's value commitments.

The message to the public should be: Facebook cares about content review and takes it so seriously that it is implementing a mechanism aimed to reach the best and most credible solutions.

### *Some Possible Objections and Responses*

1. *Drawing attention to Facebook balancing may add salience to controversy where relatively few people are currently paying attention (“breaking into jail”).*

Once announced, the Facebook courts will make news only when they issue decisions. Even then, coverage is likely to be moderate to minimal, as it is for government courts most of the time. The public that pays attention is the public that is already engaged on the issues.

What's more, when salience of an issue is already high, court-style decisions provide finality and legitimacy to their resolution. Actors are much less likely to sustain conflict after decision is reached.

2. *The Facebook courts may be too independent of Facebook interests.*

Independence is the point. The success and legitimacy of the Facebook courts will only be fully established when the courts rule against Facebook's expressed preferences on some issue.

But the longer term goal will be to establish the legitimacy of a process implemented and shaped by Facebook itself. The costs of individual decisions that deviate from Facebook preferences should be small compared to the gains of legitimacy and finality.

3. *The Facebook courts may rule on major Facebook issues that properly belong to management policy.*

The Facebook courts will be limited in the scope of their judgments. When it comes to sovereign actors (discussed below), the courts will follow a strict protocol specified in advance, such as deferring all political decisions to management or, alternatively, deferring to valid local law.

4. *The Facebook judges may be prone to overreach or self-aggrandizement.*

The judges chosen will be role-constrained, seeking respect for the quality of their judgements and (perhaps) auditioning for judgeships in government courts. They will want to have their contracts renewed, and will also be collectively self-regulating.

5. *The public may consider Facebook courts too independent of Facebook, so that Facebook is seen as outsourcing decisions that should be made by Facebook itself.*

Tiers 1-3 remain fully Facebook controlled. And the tier 4 and 5 courts should be perceived as Facebook courts. Facebook owns the outcomes here, subject to the judges' decisional independence.

**6. *The public may consider the Facebook courts insufficiently independent.***

The Facebook courts will establish their independence over time by ruling sometimes against Facebook's expressed preferences. Constitutional court judges are understood to be part of the state, yet their independence is also accepted. This balance can be borrowed for the Facebook courts.

**7. *It may be too costly and time-consuming to explain decisions.***

Courts are inexpensive. Virtual courts with part-time contractor judges are cheaper. Tier 3 Facebook decisions will remain in place unless and until Tiers 4 and 5 displace them, so speed is not altogether essential.

**8. *The Facebook courts may be too successful, creating pressure for Facebook to adopt independent decision-making in other realms.***

Facebook must make it clear that the judicial model is only appropriate for the kinds of values-balancing questions in which judges specialize. Judges are bad at policy, and no one should expect Facebook to use judges to make decisions about design.

That said, if Facebook were to find the mechanism useful in other contexts, the success of Facebook courts would be useful as a scaffold on which to build that further mechanism.

**9. *Ceding decision-making to independent courts may invite governments to regulate content themselves.***

By taking responsibility for independence, Facebook should actually reduce the demand for state-mandated independent content regulation.

**10. *The existence of Facebook courts may play up the differences between Facebook's values and local laws and courts.***

Where local courts fail to protect expression or association, the differences will usually be to Facebook's credit. Over time, some jurisdictions may evolve to match Facebook's doctrine.

Transparent, reasoned decision-making will also pressure local courts to issue comparably high quality decisions.

Ultimately, where conflict exists, it cannot be suppressed. The Facebook courts may even provide a mechanism for conflict resolution.

Further discussion will follow in the sovereignty section below.

**11. *The Facebook courts may not represent minority interests.***

Courts are the best available mechanism for defending minority rights and interests.

**12. *The Facebook courts may make poor decisions from lack of expertise or experience.***

Personnel should be experienced, highly educated, sophisticated, and trained. There is opportunity for appellate review and for the gradual evolution of jurisprudence.

## Sovereignty

Facebook's interaction with sovereign states is a complex, multi-faceted policy challenge that cannot be solved purely by a mechanism like the Facebook courts. Nevertheless, the Facebook courts can play a major role in **implementing policy decisions** that are taken by Facebook management.

Above all, by acting to a degree like a sovereign in establishing courts, **Facebook presents itself as a responsible decision-maker**, prepared to use a method of decision-making deemed valid and legitimate (at least in principle) by most governments on earth.

### *Three models*

Consider three **alternative, ideal types** of models for interacting with sovereigns that Facebook could adopt – and the role of the Facebook courts in each.

#### **Type 1: Separation of powers between Facebook courts and management**

Facebook could decide that its courts will have **no authority** to rule in situations where a sovereign state is threatening **steps that would affect Facebook's business on a major scale**.

When the sovereign is threatening steps such as blocking the whole platform or massive fines, **decision-making authority would remain with Facebook management**, as it presently does.

On this model, the Facebook courts would be **restricted** to the **judicial function** of resolving **ordinary disputes** over content restriction. Sometimes those involve sovereign states, such as when those states seek take-down of particular content via their courts or law enforcement avenues. These disputes would ordinarily be resolved at tier 2 or 3. But if users or Facebook objected to the sovereign's requests, users or the sovereign states could appeal to tiers 4 and 5.

So long as the consequences of the takedown did not fall into the category of affecting Facebook's business on a major scale, the Facebook courts would decide using the value commitment.

When decisions would have major scale effects, however, the courts would **direct those issues to management**.

The main advantage of this separation of powers model is that Facebook courts would not be taking actions that are essentially business decisions.

A further advantage is that the separation model acknowledges that Facebook management itself must take difficult decisions that combine business and politics on a major scale, especially how and whether to engage in states that severely restrict free expression.

A corresponding drawback of the separation model is that it makes it harder for Facebook management to draw on the legitimacy of the Facebook courts to handle its most highly controversial policy decisions. The Facebook courts would be able to decide many cases involving sovereigns – just not the most important.

Facebook management could at its discretion choose to solicit advice from the Facebook courts on major policy decisions. That might prove valuable, but it lacks the power of granting authority to Facebook courts.

#### **Type 2: Facebook as quasi-sovereign**

Facebook could declare that its default position is to follow its own values commitment on its own platform, which extends transnationally. Where other legal systems would claim to dictate results different from those chosen by the Facebook courts based on Facebook's values commitment, Facebook would adopt the international-law principle of **comity**. That is, Facebook would show **due respect to other legal systems but would not defer to them when their values diverged strongly** from Facebook's.



The ultimate decision on comity would be made **by the Facebook Supreme Court on a case-by-case basis**. The cost-benefit balancing would be made on the **basis of principles and values, not business interests**.

In this model, the Facebook courts would play a key role in **keeping Facebook from compromising** its own core values in expanding to new markets and engaging with sovereigns who restrict expression and association. Facebook management could explain to sovereigns that it was pre-committed to following the values the Facebook courts are charged with preserving.

The obvious cost of this approach is that it **potentially puts key business decisions in the hands of independent actors**.

The benefit of the approach is that it would **actively bind Facebook's hands according to its own values**, thereby avoiding a situation in which the temptation to compromise outweighed the long-term benefits of holding firmly to Facebook values.

A further possible benefit would be to strengthen Facebook's negotiation position vis-à-vis repressive governments. Any takedown threats by the governments could not be bluffs, because the Facebook courts would call those bluffs regularly.

And before Facebook chose to engage in a state where the sovereign systematically restricts free expression, the state would be on notice that Facebook would not bend its principles to please the sovereign. The **independence** of the Facebook courts would effectively act as a **guarantee of non-compromise on core expression and association values**.

### **Type 3: Facebook as legal actor in compliance**

Facebook could make it a policy to **comply with all validly enacted local laws** – full stop. Rather than case-by-case analysis of the equities of compliance, Facebook tiers including courts would simply **take down all matter that they found to violate local laws** in a jurisdiction, without judging the laws' morality or desirability. This would be defensible on the ground that Facebook cannot be responsible for picking and choosing which laws to follow, and where.

One major consequence of this approach would be that Facebook would then have a **stated policy to guide it when entering markets that limit free expression** and association.

In response to the plausible criticism that Facebook should not compromise its values by entering such markets, Facebook could reply, truthfully, that it has an obligation to obey valid, applicable laws and does not see itself as qualified to sit in judgment of existing sovereigns and determine whether their laws are just, wise, or democratically enacted.

What is more, **all** sovereigns restrict expression and association to some degree. Facebook could simply acknowledge that it does not want to be in the business of second-guessing states' own determinations of such matters.

In this compliance model, the Facebook courts would function as the **independent mechanism for ensuring respect for local laws**. One of their tasks would be to ascertain that sovereigns' requests were actually expressions of law, not arbitrary commands of renegade or extra-legal government actors.

This role could actually prove to be highly significant. Many **governments that suppress expression do so by extralegal means**. That is, the laws of the sovereign state may promise free expression, while the practice is otherwise.

The Facebook courts could **publicly refuse to enforce extra-legal expression restrictions** by government actors. This could have the effect of limiting those governments' extra-legal restrictions, which would be publicly revealed as unlawful by their own legal standards.

In theory, some sovereigns might retaliate by increasing their own legal authority to restrict expression. Again in theory, that could drive a race for states to legally restrict more and more expression in order to bind Facebook.

Such a vicious race to restrict, however, seems highly unlikely. States have strong reasons of their own not to publicly acknowledge restrictions on expression and association, in the form of costs to the states' internal and external legitimacy. The opportunity to bind Facebook would be a mild added incentive for them. But far more likely, the states would make an up-front decision about whether the benefits of allowing Facebook into their countries outweighed the costs of openly restricting more expression as a matter of law.

## Annex: The Independent Judicial Model in Private Enterprise

The proposed Facebook courts model is in certain respects unique. However, there is an important, existing, **functioning example** of the use of an independent, quasi-judicial body of decision-makers in the private sector.

Alternative Dispute Resolution (ADR) – including arbitration and mediation – is a widely used institutional mechanism that is based on the adoption of a judicial independence model by private enterprise. A large legal literature tracing back to the 1980s addresses its costs and benefits.

ADR is in general viewed as highly successful from the standpoint of industry, and is criticized by consumer advocates.

ADR thus provides an instructive **example of how an independence-based judicial model can succeed**. Its **limitations** are also useful to show the ways in which the proposed **Facebook courts model differs**.

### *Two Types of ADR*

ADR comes into existence when parties to a contract agree to resolve disputes through specified ADR mechanisms rather than courts.

ADR can be usefully divided into two types:

1. When the parties are **of equal power**, rules of decision and choice of arbitrator are negotiated in advance.
2. When parties are **not** of equal power (as in most **consumer contracts**), the rules and decision-maker are effectively imposed by the vendor.

These two types of ADR differ substantially in practice. Equal-power ADR, such as in **high-stakes international arbitration**, can sometimes involve elite decision-makers who act very much like judges. They hear arguments, hire law clerks, and produce complex, reasoned decisions, which occasionally (although rarely) are made public by agreement of the parties.

In **consumer-facing ADR**, decisions are typically more routinized and fast. Often no reasoning is given for decisions. Decision-makers are not high-profile, and the whole point is to avoid extended judicial-like proceedings in order to control cost.

In general, **ADR produces outcomes that are accepted as legitimate**. Requirements for reason-giving vary. Typically, **no body of precedent** emerges from ADR judgments that have been accrued over time, although there may be exceptions for some big-ticket international arbitrations.

Consumer advocates criticize consumer-facing ADR on the ground that the system favors repeat-player actors like corporations over individual consumers. It is also subject to the criticism that it seeks dispute resolution rather than principled justice.

### *How Facebook courts would differ*

Several key features make the judicial model proposed here different from ADR.

- The Facebook Courts model is **more ambitious** than most ADR. While ADR aims to resolve specific disputes in isolation from each other, the Facebook courts are intended to produce **broad public legitimacy** for a whole area of Facebook decision-making.
- Facebook courts aim to produce a **consistent jurisprudence of precedent**. ADR decisions typically do not create a precedential body of law.
- Facebook courts aim to produce **principled, reasoned, transparent** decision-making. ADR may

sometimes achieve this but often reach decisions without revealing reasoning.

- Facebook judges are **Facebook contractors**; ADR decision-makers typically do not contract directly with a consumer company.
- Facebook Judges are **higher profile** and **higher prestige** than most ADR decision-makers. (In some specialized areas of international arbitration, arbitrators may be of comparable stature.)
- Facebook courts would operate in an appellate structure. They would **not engage in fact-finding**, unlike many ADR entities.

### *Takeaway*

ADR provides some modest proof of concept that the judicial model can work in the private sector. But the Facebook courts would be an innovative departure from past practice, intended to achieve more than ADR has historically accomplished for its users.



## Considering FB's Oversight Board: turning on expectations.

The International Criminal Court is popularly referred to as the “world Court”. With Facebook’s announcement to create an appeals, independent body to review the application and enforcement of its terms of service over its 2.7 billion users all around the globe, the term “World Court” probably gained at least one more, new-found meaning.

Since the creation of this body launched there have been advocates for and against it. The common lines among both sides is that 1) this is a self-regulation initiative and cannot replace a judicial stance of control; 2) as it stands it only addresses some of the issues that users have with content moderation; 3) there are more questions than answers regarding nature, scope, design, expectations, etc; 4) the creation of this Board, although an interesting proposal, should not divert the company’s attention from due process for all content restrictions and curation, and for transparency in rule and decision-making as well as implementation of standards, whether legally imposed or self regulated.

## Background and implications to the Oversight Board

After a couple of years of scandal after scandal and a growing set of rules, Facebook is seeking legitimacy in governing what the US Supreme Court has ruled to be “the new public square”. The rules (<http://www.facebook.com/communitystandards>) have gained in complexity and ambiguity over the years and with every addendum ([internal guidelines](#) are being changed every week or so, and an overall 2000 changes are included per year approx. in total, according to information provided by FB). Content “flagged” by users to be against those rules raises to a meaningful daily amount.

Per user and government pressures of all sorts, the company has moved content moderation from a responsive to a proactive mode, having automated most of its detection practices (yet unclear how much of its removal practices) for unwanted content and facing extremely complex debates over ethics, corporate social responsibility, liability, damages, and free speech, among others.

The decision to create an independent council or oversight board for Facebook, with an open process and consultations is maybe the most dramatic decision that we have seen from FB in the last few years, at least regarding its content policy. And a first step among internet companies to bring in external actors to their decision making processes. After having shifted the rhetoric from a free-speech oriented discourse to a safety discourse over the last few years and having been on a defensive and ever expanding curating role for increasingly complex typologies of content, Zuckerber’s [Blue Print for Content Governance and Enforcement](#) (nov 2018) seems to mark a new departing point for the company’s approach to content regulation.

For one, Zuckerberg’s note appeals directly to the need for improved legitimacy over governance and decision-making; Second, there is a commitment to create an external independent review council, whose decisions are binding and public. Every other detail, still unknown. Third, it expressly invites States to define what they expect from a content moderation regime and details at least two concrete initiatives that FB has already engaged with in Europe: 1) the agreement signed with President Macron to work on a new content regulation; 2) their workings towards a new European framework for content moderation and regulation within the next two years. Although FB had anticipated their change in view *vis a vis* legislation during hearings before the US Congress in 2018, this is the first communication that FB sends to its own community officially welcoming and even compelling States to regulate. As Zuckerberg states: “At the end of the day, services must respect local content laws, and I think everyone would benefit from greater clarity on how local governments expect content moderation to work in their countries.”

The recognition that “A full system requires addressing both governance and enforcement” is without a doubt a positive step forward in content moderation debates, particularly those related to transparency. Civil society and academics around the globe had voiced their concerns as to the lack of transparency and the levels of discretion that internet companies enjoyed and have been working with them through the years to improve transparency first over the rules and later onto processes.<sup>1</sup> With the new approach, FB may be able to take procedural and enforcement transparency further while making decisions binding and public.

But maybe what is even more interesting is the policy change vis a vis content governance on the platform and what seems to be a new found willingness to “share” the responsibility (or blame) over rule-making. “As I’ve thought about these content issues, I’ve increasingly come to believe that Facebook should not make so many important decisions about free expression and safety on our own” wrote Zuckerberg in November. Human Rights activists have been saying so for years. What changed? And how much did it change?

The creation of a board to serve as an audit to this platforms’ decisions on content moderation could strengthen the exercise of free speech online as much as it could hurt it. If the Board is understood as an internal process, intended to serve the company in dealing with complex issues of free speech and its balance with other rights, unify criteria, and help the system converse better with international human rights standards, the results could be more positive for the entire ecosystem. If understood as a replacement system for already weak due process mechanisms within the platform’s decision making structure, and as a body that would create and interpret privately legislated law alone (contract law), it will most probably damage the ecosystem as well as the company. It would also fail the purpose for which it was created. If legitimacy is what FB wants and needs, it can only be built from the dialogue between the private self-regulation norms and existing international human rights standards.

Whether this Board can accomplish legitimacy or not in many ways depends on how the body is structured, the goals that are set for it, the requirements that candidates should meet to be a part of this body, the nature of its decisions (if it is an appeals body in fact), and the transparency and publicity of its decisions and reasoning.

## Legitimacy in adjudicative bodies:

The concept of legitimacy may be approached from a sociological and a normative dimension and the distinction could be useful to illustrate this point. On the one hand, the more positive the public’s attitude towards an institution’s right to govern, the greater its popular legitimacy<sup>2</sup>. However, this legitimacy is fragile. Particularly for FB’s Board, which will not have a reservoir of legitimacy accumulated over a long history to draw upon. On the other hand, legitimacy can also have a normative meaning, referring to whether the claim for authority is well founded<sup>3</sup>. Given the global challenge that FB faces, the legitimacy of FB’s oversight board must be strengthened on both fronts, but even more so in the latter. Building strong normative legitimacy could provide a standard for judging the Board and deciding if it deserves support. Also, normative legitimacy can influence sociological legitimacy, or perceptions of justified authority, and thereby, the extent to which it will undergird or undercut the work of the FB’s Board.

There is rich literature on what elements contribute to the legitimacy of adjudicative bodies. There are even concrete writings on the legitimacy of international adjudicative bodies. What determines their legitimacy? Scholars and practitioners have identified three key elements to the legitimacy of international adjudicative mechanisms: 1) fair and unbiased decisions; 2) an interpretation and application of rules consistent with its scope and purpose; and 3) that the body be transparent, independent and infused with democratic norms<sup>4</sup>.

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1 RDR, GNI, to name a few.

2 Richard H. Fallon, Legitimacy and the Constitution, 118 HARV. L. REV. 1787 (2004–2005)

3 Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, 93 AM. J. INT’L L. 596, 601 (1999).

4 N. Grossman, N. Grossman, Legitimacy and International Adjudicative Bodies, 41 Geo. Wash. Int’l L. Rev. 107 (2009–2010)

Fair and unbiased decisions need to be at the heart of any adjudicative system, not only international ones, in order for them to be legitimate. “Unbiased” has traditionally been related to independence and hence has focused on nomination and selection processes, quality and soundness of reports, decisions and recommendations, the public discourse and the writings of the tribunal members. All these elements have concrete and relevant definitions dispersed among a vast international and comparative jurisprudence that should not be ignored.

Fairness, on the other hand, according to Prof N. Grossman, “need not entail an equal ratio of rulings in favor or against any given party –in fact, most human rights adjudicative mechanisms issue much more rulings against States than they do against petitioners and they may still be legitimate for both parties–” but necessarily requires equality in arms, due process and consistent application and interpretation of the law.

As to the interpretation and application of the rules consistent with its scope and purpose, this is probably among the key elements to making FB oversight board legitimate. Community standards have a scope and a purpose and they daily dialogue with other norms, including national, regional and international human rights norms. The decisions and rationale behind individual case solutions (if FB so chooses) should follow the same logic and dialogue between community standards and human rights norms. Additionally, that logic should be transparent and published. The independent and objective reasoning behind each decision is what an experts’ board adds to a closed system like the existing legal team at FB.

Finally, transparency in this context may be defined as a quality: an office or a body, whether judicial or otherwise, is transparent “when it creates the conditions that allow society to fully and clearly understand how they act, the reasons behind their acts, as well as the costs and resources associated with those actions.”<sup>5</sup> This factor affects the previous two as well in that without some degree of transparency (manifested through some or all of the following: publishing decisions or having them publicly available, having reasoned decisions, identifying the decision makers, their dissents and concurrences, etc.) there is no way of evaluating whether a body is biased or not, or whether its decisions and interpretations of the norms are within the reasonable scope and purpose of the law.

While the legitimacy of international adjudicating bodies traditionally derives from the state’s consent to its jurisdiction, the legitimacy of FB’s Board would derive from: i) building a solid foundation on fair decisions; ii) a consistent and persuasive interpretation --persuasion is one of the legitimacy function-- of the community’s rules in dialogue with international human rights standards; iii) and holistically transparent mechanisms.

## Representation vs diversity

One of the main goals of FB’s Board is bringing greater legitimacy to its content moderation system. Diversity is often mentioned as one dimension that adds towards the legitimacy of a body, particularly when the constituency that the body governs is diverse. Diversity has many meanings though and should not be confused with representation.

Obviously representation could enhance the legitimacy of the board’s decisions in the eyes of the broader community, particularly those that make it to being represented within the Board. However, a 40 member Board like the one that is being proposed could hardly represent a 2.7 billion member community. It is practically impossible to provide representation for all. Not direct, proportional, or even asymmetrical representation could be accomplished in such an uneven ratio and because of the scale that FB has, there probably couldn’t be a viable ratio to work with. This issue should be acknowledged and incorporated into the design of the oversight board so as to create realistic expectations. Ignoring it would probably mislead users, creators and bystanders and will severely undermine the ultimate goal.

Lacking representation, which could provide for diversity of voices, technical expertise could be the next best thing. Not a representative Board but a technical body capable of overseeing FB’s implementation of their own policy, in dialogue

5 M. Pulido Jiménez, M. González Armijo, M. Sánchez de Tagle, S. Ruiz Cervantes, J. Sáenz Andujo, Hacia un modelo de transparencia y acceso a la información en el sistema interamericano de derechos humanos, en Desafíos del Sistema Interamericano de Derechos Humanos Nuevos tiempos, viejos retos, Capítulo 3. Colección DeJusticia (2015) pag. 112, disponible en <http://www.dplf.org/sites/default/files/desafc3ados20del20sistema20interamericano20de20derechos20humanos20versic3b3n20final20pdf20para20web-2.pdf>

with human rights norms. Such technical membership should consider cultural, geographic and gender diversity towards its conformation to allow for an actual dialogue among different experts and avoid a single voice/view approach. This diversity is key to guaranteeing closeness and cultural understanding across borders; deal with novel interjurisdictional issues, and serving the vast community that FB serves. There is no unique model to fit every need. Deciding what FB's Board will be necessarily implies defining and accepting what it will not be.

## What is expected of the Council broadly?

The draft charter suggests that “The board will be a body of independent experts who **will review Facebook’s most challenging content decisions** - focusing on important and disputed cases. Among the first questions that may be raised is what for? What is the ultimate goal in having the Council review these decisions? This question impacts directly on the type of structure that FB is trying to create. Is this a Supreme Court, a Court of appeals, a peoples’ court? Or is it a panel of peers approach? Can it be an advisory body or are we set on a reviewing nature? How will this Council interact with other existing structures within facebook (security and safety, policy and outreach, to name a few?)

If it is in fact a “Supreme Court-like approach”, which seems to be the rationale for it, Yale Professors Klonick and kadri argue that “what this really means for free speech and fair process on the internet will depend on the answer to one key question: How much will the “Supreme Court of Facebook” be like the Supreme Court of the United States?”<sup>6</sup> As they argue in their New York Times piece, a key element to the US Supreme Court (like every other supreme court) is that it is bound by a set of rules that remain unchanged through time: The Constitution. But, as described in brief background section to this paper, FB policies change every week and so far there has not been a formal adoption of any specific standard or rule to enlighten that process. What should the equivalent be for FB’s Council?

UN Special Rapporteur David Kaye argues that international human rights norms should be the ultimate rules to govern online content moderation.<sup>7</sup> The adoption of such standards provides a universal basis and a somewhat common understanding on what free speech means and what guarantees should be considered when limiting it. It would also provide common language to define and understand some restrictions, avoiding contradictory and ever-expanding terms (like hate speech). Ultimately the adoption of universal rules on human rights, particularly free speech, would also guarantee some certainty against discrimination and abuse, whether these arise from governments, users or advocacy groups, and would contribute to ensuring that no one is “a priori” excluded from public debate, which is the standard set by the Inter-American Court of Human Rights in Advisory Opinion 5 of 1995, one of the most progressive and protective international interpretations of freedom of expression and access to information.

Having international human rights norms be the “Constitution equivalent” has many advantages. However it also has certain limits that cannot be ignored. Key among those is the freedom of the platform to develop and protect its business and to tailor it to different audiences. Example: Adult entertainment is not illegal and is protected under international human rights standards. Following a direct application of international human rights law, no company could prohibit the distribution or uploading of pornography or violent content to its platforms. However, every company must respect and abide by the UN Principle on Business and Human Rights, which creates concrete expectations vis a vis company engagement with human rights, duty to mitigate and prevent violations, duty to provide redress, etc.<sup>8</sup>

The dialogue between international free speech standards and Facebook’s content rules should be promoted, developed and expanded. Should/Could the Council be the body to do that? The answer to this question will probably contribute to defining the goals for this Council.

6 <https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html>.

7 <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx>.

8 UN Guiding Principles on Business and Human Rights, [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

*Should it be an adjudicatory body, what are the models out there and what can be imported to this new structure: arbitral systems; judicial tribunals; international tribunals; media councils; and more.*

One of the main goals of FB's Oversight board is to bring greater legitimacy to the content moderation system; but creating a body legitimate enough to do so is among the main challenges.

Although this private council to oversee and unify content moderation decisions is a first of its kind, there are already numerous different models that can and should inform the process that FB is undergoing. First, the company should take advantage of the best practices and lessons learnt from over 100 years of international adjudicatory mechanisms of different sorts if the idea is in fact to create an adjudicative body; Second, there is a legitimacy to these bodies that justify their baring in deciding how to move forward with this particular initiative; third, as opposed to national decision-making bodies, international adjudication was specially designed to deal with cultural and national differences, having gained an expertise on the matter that should be acknowledged and learnt from.

International adjudication mechanisms vary from area to area and from region to region. There are different models that could be looked at, including the International Court of Justice; the different arbitration mechanisms that were created to deal with bilateral investment treaties (i.e. ICSID); the Human Rights Committee created under the International Covenant on Civil and Political Rights; the different regional human rights adjudication mechanisms that exist (i.e. European Court of Human Rights, Inter-American Court of Human Rights, African Commission on Human and Peoples' Rights). These are but a few examples of international adjudicatory bodies that already exist and that have faced already some of the most challenging issues that FB's board will most probably face -i.e. cultural differences, language, nationality, global norms and standards; international sources of law.-

The design chosen for the Council will of course determine a number of other things, including the nature and standing of its members, the dynamics that the Board is expected to have, the way and tools it will have to deal with diversity in all its shapes and sizes (criteria, language, legal culture, etc.). Arbitration panels for example are case specific, diverse, made up of individuals selected from an existing list of accredited arbitrators. They rely upon a strong secretariat to maintain the process on track and guarantee minimum procedural cohesiveness and some institutional memory that is helpful in processes that are often times confidential. The ability to choose arbitrators helps the parties build trust around the process, providing for an opportunity for each party to choose an arbitrator and having the third usually being appointed by the Secretariat. This also contributes to guaranteeing some familiarity between the decision-makers and the issues, context, language and culture that the case has arisen in. The diversity of the pool of arbitrators is particularly relevant to these structures. Still, the decentralized nature of the body itself can attempt against cohesiveness of the decisions arising from the body. The fact that the panel is case specific can be problematic when trying to define through interpretation the meaning and implications of an otherwise general or broad international standard.

International tribunals like the Inter-American Court of Human Rights or the European Court of Human Rights are radically different from arbitration panels. They have a consistent membership through the years, which guarantees some consistency and legal certainty as to the decision-making criteria. It also guarantees a greater level of equality for their users. Most of the times there is cohesiveness to their decisions and their permanent nature provides more transparency and accountability of the panel itself. The downside of these structures is that guaranteeing diversity and representation of every potential party is not possible and they are probably more constrained in the number of cases that they can review in a given year. The Inter-American Court for example always hears cases in full. The European Court has set up a system whereby the members of the Court sit in different chambers, each having 3 judges appointed to them. Some decisions are brought to the Grand Chamber and therefore they guarantee the cohesiveness of their decision-making more broadly.

As set out in the brief examples, there are different potential models that FB could adopt in designing their Council. Still, regardless of the one they choose, comparative and previous experiences should be consulted and taken into account when finalizing this project.

In taking these tribunals and its practices under consideration, particular attention should be paid to the lessons learned



and the worst and best practices arising from them. One of the many problems that these tribunals face is the backlog that they generated. Cases take a long time to be litigated before these bodies, whether they require a lawyer or not, and access to international tribunals is not easy. Key among the questions that FB should ask itself is how is this “private quasi tribunal” going to work in scale? Will they be adding to a systematic crisis worldwide vis a vis access to justice, or will they be contributing to at least partly solving that issue. The goals and expectations for the Council are not a minor thing to consider here: if this is an appeals Court, a users resort of some sort, how will this body deal with 2.7 billion users and the amount of content they generate?

FB already faces criticism for their internal immediate processes for reviewing company decisions on content moderation. These include not only removal decisions, but also decisions to downgrade or foster the circulation of certain contents versus others. These issues will not be solved with an oversight board and in fact, the creation of an oversight board should not draw the attention away from them -regular appeals mechanisms within the company-, as these are the basis for any potential redress for wrongful or unfair content moderation practices.

A Supreme Court (or Constitutional or international Court) style approach could make a much more substantive contribution and fit more smoothly into the scaling issue. However there should be a lot more clarity as to expectations, criteria, process, case selection, standing (for NGOs, users, consumer organizations?), etc. for this board to receive and select cases, deal with them and make them public. Decisions arising from the Board should also impact the resolution of similar cases within FB’ regular content moderation operations and appeals processes, thereby turning the Board into an internal reference and authoritative body for the company to interpret ToS in dialogue with international human rights law. Otherwise, and because of issues of access, scale and relevance, the exercise will soon derive moot.

## Who will be part of this Council? Requirements to be members of the Council?

In thinking about adjudicative bodies, who decides is as important as how they decide. Still, the question that we propose is not literally who will be on the board but rather what will the criteria be for selecting those members. The question is very much linked to the expectations that one may have for this board. Who or what is it overseeing and what for?

Selection criteria is key to guaranteeing legitimacy as explained above. Comparative and existing bodies should also be brought to bare in defining the eligibility criteria for Board members. Knowledge and expertise in international human rights and particularly free speech should be among the qualities of any candidate. This recommendation should not be taken lightly. FB already has security and safety councils where third party experts participate and actively engage in designing the company’s policy and terms of service. Reviewing content moderation and curation decisions necessarily implies balancing freedom of expression against other rights.

Most international human rights adjudicative bodies require that its members meet the requirements in their own countries to be judges and that they have demonstrated expertise in human rights. While not every judge will have the same education (some will be from common law countries, others from civil law traditions; some will be from the global north, others from the global south), they will all have some sort of legal education- Members of the Inter-American Commission or the UN Committee need not be lawyers but need a number of years of experience, sound knowledge of international human rights law and high moral and ethical standards. In order to be in an arbitration panel, there are certain requisites including being versed in law that arbitrators need to meet.

As opposed to other structures common to a number of different companies -like the security and trust committee, or the children’s safety group- the oversight board that is being proposed is intended to deal with limits and restrictions over speech. While these other bodies are mostly made up of experts on children’s issues, vulnerable populations, risk management, violence and abuse, there probably are not many free speech experts within those groups. Different areas require different skills and a key question that FB should ask in defining criteria for the oversight board is what their role will be and what their skills should be.

## Conclusions:

First and foremost, in designing FB's oversight Board, FB and its team should evaluate the impact of such a body on the human rights of its users, particularly freedom of expression, due process, access to justice, equality and non-discrimination. It should also evaluate how this Board, whatever the structure it ends up having, will contribute towards implementing the UN Business and Human Rights Principles.

Legitimacy is a key element that both FB and its users crave in its content moderation. Still, legitimacy may be defined in different and varied ways and legitimacy among decision-making bodies require certain key characteristics that should not be ignored if the goal is set for an adjudicative body. Scale and diversity in this particular case -with a 2.7 billion user constituency across 180 countries- pose additional and complex challenges to accomplishing legitimacy in traditional representational models. These challenges should be acknowledged and addressed systemically. FB should not target that which it cannot provide.

There are still more questions than answers surrounding the creation of FB's oversight board. In defining and answering those questions, particular attention should be paid to the objectives and expectations for the oversight board. After many consultations, it is clear that different organizations and different people will have different expectations for this body. Clarifying what FB is thinking on these points is key and it will be important to provide new spaces for dialogue and comments after the company lands a concrete proposal for its Board and before it actually implements it.

Should FB decide to create a private adjudication model, it should bare in mind best practices and lessons learned from the many and diverse structures that adjudication mechanisms have adopted over the years, with varying results. International adjudication mechanisms are particularly relevant to look at since they are cross-borders, serve an inter-jurisdictional multicultural constituency, are courts and mechanisms of last resort, and usually resolve complex and intertwined legal issues.

Following FB's human rights obligations as well as the particular framework that speech restrictions enjoy internationally, particular attention should be paid to the technical expertise required for members of the Board to join. Developing concrete, specific and clear criteria for the selection of the Board is key to its founding, regardless of who chooses the first set of members. The selection criteria will depend on the objectives and the concrete expectations for this Board.

## About CELE

The Center for Studies on Freedom of Expression and Access to Information is a research Center housed at Universidad de Palermo, in Buenos Aires, Argentina. The Center provides legal technical research to promote the understanding and development of freedom of expression and access to information, particularly in Latin America. Since 2012 we have an Initiative for Freedom of Expression online (iLEI- spanish) under which we have studied and produced research pertaining to online free speech, access to information and privacy particularly under the framework of the Inter-American human rights system and standards. Our strategies to affect change include research; capacity building; and promoting spaces for high level reflection and debate. Please visit us at [www.palermo.edu/cele](http://www.palermo.edu/cele) and at [www.observatoriolegislativocele.com](http://www.observatoriolegislativocele.com).

## Subject: Comments on Facebook Oversight Board Proposal

Date: June 4, 2019

### Summary

The following document addresses Facebook's Oversight Board proposal around three elements: (i) The practical tension between international standards and Community Standards; (ii) the challenge of scale and context in content moderation, and (iii) the importance of the appeal process. Based on this points, we consider that the Oversight Board proposal –and its related debate– is overlooking key issues around the problem of content moderation in Facebook. In particular, we believe the Oversight Board should not be drafted as an 'international tribunal', but focused on advising and overseeing the implementation of the Community Standards. In that sense, we believe the proposed framework for the Oversight Board is inadequate.

### 1. The Oversight Board's mandate: Between international standards and Community Standards

According to Facebook's Draft Charter for the Oversight Board (OB), *"The board will be a body of independent experts who will review Facebook's most challenging content decisions - focusing on important and disputed cases"*.

Furthermore, the Draft outlines three main responsibilities for the OB:

- Provide oversight of Facebook's content decisions.
- Reverse Facebook's decisions when necessary.
- Be an independent authority outside of Facebook.

According to several authorized voices within civil society, the OB's mandate should be guided by international standards and, specifically, recognized freedom of expression principles. Access Now, for example, made the following recommendation in its comments about the OB proposal (<https://www.accessnow.org/cms/assets/uploads/2019/05/AccessNow-Preliminary-Recommendations-On-Content-Moderation-and-Facebooks-Planned-Oversight-Board.pdf>) : *"It is necessary for all companies to apply these essential human rights principles when they make decisions that impact user speech, regardless of whether the decisions are made in-house by content moderators or externally by an oversight board"*.

The concrete way these human rights principles would be implemented –and reflected– in both the OB mandate and the Community Standards (CS) is an overlooked issue by many civil society groups. Would the implementation of his framework affect, for example, the way Facebook balances users' security and trust against freedom of expression? And, moreover, is Facebook willing to change an approach that currently restricts forms of speech that are legitimate under human rights instruments?

As Daphne Keller explains (<https://cyberlaw.stanford.edu/blog/2019/05/what-online-content-are-we-regulating-illegal-speech-offensive-speech-and-platform>), *“Even for committed free-expression advocates, it is not clear that requiring platforms to preserve all legal speech is in the public interest. There are speech rights on all sides of the issue”*. Also, there are clear economic incentives for platforms to reject a framework that abides by international standards: *“Requiring platforms to carry speech that most users don’t want to see would also have serious economic consequences. Among other things, platforms would lose revenue from advertisers who do not want their brands associated with hateful or offensive content”*, concludes Keller.

As the OB proposal stands today, Facebook has not explained how –or if– it expects the OB to reconcile the platform’s CS with international standards. By the same token, civil society groups are suggesting adjudication and due process guidelines for the OB, akin to international courts, disregarding the challenges of keeping online legitimate, but very problematic, speech. These disjointed visions fail to address the underpinning issues of content moderation and the best use of an OB within Facebook’s current reviewing process.

While this document does not attempt to suggest a structure or mandate for the OB, we believe that such a body should focus on assessing the existing enforcement of the CS, taking into account that this process is producing considerable false positives in the basic levels of moderation that are not being properly reviewed in further stages. In that context, the OB could also be an advisory instance on policy development and enforcement, but not an ‘adjudication’ body.

All in all, creating an instance –such as a ‘tribunal’– that is not articulated with the practical problems of content moderation at inferior levels, is inconvenient. In addition, it creates the risk of having an elite stage of content moderation that is useful only to a handful of users.

## 2. Content moderation: context and scale

According to Facebook, about thirty-thousand reviewers have the task of assessing content that can violate the Community Standards (CS) –either because it was directly reported by a user or detected by the platform’s tools. This endeavour unfolds in a service with 2.37 billion Monthly Active Users (<https://www.socialmediatoday.com/news/facebook-reaches-238-billion-users-beats-revenue-estimates-in-latest-upda/553403/>) who post over a billion photos on a daily basis.

Facing the scale of this challenge, Facebook has underscored the need to have policies that are principled, explicable and operable. The latter aspect is paramount to Facebook’s moderation scheme: The enforcement of the CS have to be fast and scalable. But what about context? How can a massive moderation scheme incorporate nuance, local tensions and extra information in its review process?

*“The need to balance between consistency of rules, with being sensitive to local contexts, particularly for issues like hate speech and disinformation, is of particular concern when considering both the design of platforms and issues of scale”*, explains Robyn Caplan. While small platforms can have processes that afford contextual assessments –either artisanal or community-based strategies–, Facebook, Twitter or Youtube, among others, can only introduce such kind of review in very specific cases.

We do not have any details related to the number of cases the OB would review. However, it seems clear that such a body will have a rational amount of cases, giving them precisely the time and space to implement a reviewing process that day-to-day moderators do not execute today and are unlikely to execute in the future. Apparently, the OB will deliberate, introducing information about local settings and case specifics. Without a doubt, this instance will be able to produce sound decisions around CS enforcement. However, what would be the use of such body if that process cannot be replicated at lower levels of content moderation? Besides some recommendations and concrete suggestions, the OB’s outcomes will only impact the concerned users.

### 3. The importance of the appeal process

The speed and scale requirements of Facebook's industrial content moderation approach produces many false positives. This is not a problem the system can correct, but an outcome of its design. Hence, the reviewing process of such decisions is key to its legitimacy. On April 2018, Facebook announced an appeal process(<https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/>) for its users. However, there is little information about its implementation, and in Latin-American markets several users regularly voice their concerns around the uselessness and opacity of the process (not to mention the language localization problems).

The implementation of the OB risks to distract the need to develop and fortify the general appealing process. For instance –as this document suggests– the OB should focus on overseeing this issue. While first-level moderators cannot afford introducing contextual elements in their review, appeals can have more nuanced assessments under specific criteria. This stage should be transparent and accountable, and unfold under clear policies of mandatory review and avenues for users to have their content restored and accounts un-suspended. Following the DMCA model, the appeal process should correct 'false positives' produced in lower stages, but specifically it should allow the protection of the user's voice in the platform.

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#### About us

Linterna Verde is an interdisciplinary group devoted to exploring and understanding the digital public debate. Our goal is to build bridges to strengthen deliberation, promote critical citizenship, and illuminate the work of civil society. Linterna Verde is a non-profit organization registered in Colombia. This brief was written by Carlos Cortés .

## “Oversight Board” de Facebook: una perspectiva desde América Latina y el Caribe

Las organizaciones que firman este documento forman parte del consorcio “Al Sur”, un grupo organizado de la sociedad civil en América Latina que busca fortalecer los derechos humanos en el entorno digital. La razón principal de esta declaración es hacer presente nuestros comentarios conjuntos al llamado público hecho por Facebook para contribuir a su borrador “Draft Charter: An Oversight Board for Content Decisions” (<https://fbnewsroomus.files.wordpress.com/2019/01/draft-charter-oversight-board-for-content-decisions-2.pdf>).

Este “Oversight Board”, que podemos traducir como una suerte de “Comité de supervisión”, ha sido planteado por Facebook como un órgano independiente al que las personas pueden apelar las decisiones de moderación de contenido de la compañía. Esta iniciativa nace luego de las intensas críticas en el mundo (y de las que Latinoamérica y el Caribe no se han restado), sobre la falta de transparencia con la que Facebook desarrolla y aplica sus estándares comunitarios, lo que ha tenido como efecto el uso de la plataforma para campañas de desinformación, incitación a distintas formas de violencia, etcétera.

Valoramos que una plataforma del tamaño e importancia de Facebook (2,167 millones de usuarios en el mundo) se haya abierto a discutir la urgente necesidad de cambiar la forma en que hasta ahora se ha planteado la moderación de los contenidos. Pero, como veremos a continuación, creemos que este “Oversight Board” puede y debe tener un papel más activo en hacer dialogar las reglas de la comunidad de Facebook con estándares de derechos humanos. Sus decisiones deben tener como fin último la mejora de las políticas comunitarias como los procedimientos para aplicarlas, así como también se debe avanzar decididamente en su transparencia y la representatividad de regiones como la de Latinoamérica y el Caribe.

Así, nuestras recomendaciones se resumen en cinco puntos:

- **Alcance de su mandato**

Sin importar la estructura o forma orgánica que adquiera el “Oversight Board” propuesto, y en orden a satisfacer su legitimidad y tener posibilidad práctica de cumplir con su mandato, creemos que el alcance último del “Oversight Board” debe comprender el de hacer recomendaciones de cambios a las políticas de la empresa y los procedimientos de aplicación de éstas, haciendo dialogar los estándares internacionales de derechos humanos con las reglas de comunidad de la empresa.

Así, proponemos un cambio de la idea original planteada en el borrador de Facebook, y planteamos directamente que el “Oversight Board” tenga la facultad de impactar directamente el diseño regulatorio de las políticas de contenido de la misma plataforma. Entendemos que, para cumplir debidamente con este rol, el “Oversight Board” puede y debe analizar casos específicos ilustrativos, sobre todo, los más complejos y difíciles. Incluso debería sugerir a la empresa cambios en decisiones con efectos reparatorios para esos casos concretos. No obstante, su objetivo central serán las mejoras a las políticas y los procedimientos de cómo la

empresa toma decisiones en relación con la moderación de contenido, teniendo la capacidad de establecer cuál debería ser el proceso a seguir, paso por paso, para tomar este tipo de decisiones, con fundamento en lo ya desarrollado en la materia por los estándares internacionales de derechos humanos. Por ejemplo, el llevar a cabo un análisis y ponderación de derechos que se apegue a los tests de necesidad, proporcionalidad e idoneidad.

En esta propuesta, es importante repensar los insumos con los que contará el “Oversight Board” para hacer su trabajo, en tanto que los casos ilustrativos pueden no advertir a tiempo tendencias preocupantes en el uso de la plataforma y en la moderación de los contenidos. Proponemos, entonces, que además se abran otras instancias donde especialistas en la materia, con conocimiento de los contextos regionales pertinentes, puedan presentar evidencia preocupante de uso y moderación de contenidos en Facebook y que puedan afectar a grupos específicos que, por su vulnerabilidad u otros factores de marginalización, no puedan o no quieran acceder a este mecanismo.

Desde esta perspectiva, creemos fundamental que el organismo asuma tres tareas urgentes:

**1)** Transparencia algorítmica. Muchas de las decisiones que afectan las reglas de comunidad y, por ende, la moderación de contenidos, tienen efecto en las decisiones algorítmicas que la plataforma tiene sobre contenidos en particular. Este tipo de decisiones automatizadas son más opacas que la remoción de contenido per se (las explicaciones de cómo funcionan y cómo se evitan falsos positivos es más bien inexistente, <https://techcrunch.com/2018/11/15/facebook-borderline-content/>) y, por ende, afectan de igual manera la libertad de expresión.

**2)** Aspectos formales de la toma de decisiones. Es urgente que un organismo técnico, representativo e independiente como el “Oversight Board” pueda hacer recomendaciones acerca de aspectos formales en la toma de decisiones de su proceso de moderación de contenidos, pues estos afectan los resultados del mecanismo. Se debe repensar desde la forma en que se notifica a las personas usuarias que su contenido fue removido, pasando por el currículum de los moderadores, hasta las condiciones laborales de estos últimos.

**3)** Mecanismos de apelación. Creemos también importante que Facebook asuma con urgencia la tarea de reforzar los mecanismos comunes de apelación que tienen las personas usuarias, adoptando criterios de debido proceso y sugerencias desde estándares de derechos humanos que el mismo “Oversight Board” pueda hacer.

Asimismo, el alcance limitado del “Oversight Board” debe ser explícito en dos sentidos para las personas usuarias: (1) el rol de la justicia y del análisis de afectaciones a derechos humanos sigue siendo una tarea del Estado, apegado al contexto local, y (2), las tareas del “Oversight Board” no reemplazarán a los mecanismos de apelación sobre el resto de los contenidos (que, como afirmamos anteriormente, es urgente que mejoren).

De preferencia, las decisiones del “Oversight Board” tienen que ser vinculantes en primera instancia. Ello favorecería la legitimación de su establecimiento y la confianza de las personas

usuarias respecto de su función, en tanto su implementación no estaría sujeta a la discreción de la plataforma. No obstante, si Facebook decide que así no sean, debiera al menos asegurar una explicación profunda y documentada al “Oversight Board” de su razonamiento en esas decisiones.

#### • **Derechos humanos por sobre valores corporativos**

Creemos que debe dejarse atrás la idea de que el “Oversight Board” responda a los “valores” de Facebook. Más bien, debe avanzarse decididamente a que su criterio principal sean estándares internacionales de derechos humanos.

Los “valores” de una compañía representan solo a su organización y a su cultura empresarial que está, asimismo, limitada a una forma cultural. Por esta razón, de ninguna manera esos “valores” deben ser el estándar de decisiones del “Oversight Board”.

Asimismo, la legitimidad y efectividad del “Oversight Board” queda en duda si sus decisiones se basan conforme a los “valores” o “estándares” fijados por la misma plataforma. La mejor manera de cumplir con la aspiración de imparcialidad e independencia en las decisiones de este organismo, y de generar una mayor confianza en este sentido, es apegarse a un

proceso que ya ha sido establecido y elaborado por los estándares internacionales existentes de derechos humanos (como nuestro Sistema Interamericano de Derechos Humanos), y que permita decisiones transparentes y replicables.

- **Alcance geográfico, diversidad y criterios de selección**

Facebook plantea, en principio, un “Oversight Board” mundial con compromiso de “diversidad” con un número aproximado de 40 personas. En este sentido, y como parte de una comunidad del Sur Global y, aún más en particular, de América Latina y el Caribe, creemos que es importante garantizar la diversidad de la composición de este organismo, pero también su pericia técnica.

Desde el punto de vista de la diversidad, es necesario que haya una composición con equilibrio de género y etnia. Además, creemos que la composición debe ser representativa de manera proporcional al número de las personas usuarias que Facebook tenga en cada región y de su proyección de crecimiento. Del mismo modo, es importante la multidisciplinariedad en sus miembros de manera de entregar visiones diversas a los problemas.

Desde el punto de vista de pericia técnica, debe buscarse en esa proporcionalidad regional, personas que cumplan con estándares claros y transparentes de idoneidad profesional como, por ejemplo, demostrada experiencia en temas de derechos humanos y libertad de expresión. Estos criterios deben ser propuestos y revisados públicamente, de manera que sean idóneos y factibles de cumplir en todas las regiones, y sean transparentes a la comunidad de manera de mejorar la rendición de cuentas de los mismos integrantes seleccionados del “Oversight Board”.

- **Reglamento interno e independencia.**

La independencia del “Oversight Board” debería ser garantizada por Facebook. Eso implica autonomía de este organismo para determinar las formas en que trabajarán, se comunicarán y las reglas con las que se regirán.

En este sentido, nos parece importante que una de las primeras tareas del “Oversight Board” sea trabajar en una propuesta de código de conducta que incluya procesos de denuncia y toma de decisiones. Este documento debe someterse a una consulta abierta. Su versión final debe ser pública, de tal forma de mejorar la transparencia y rendición de cuentas del organismo. Creemos importante que, en particular, el código de conducta debe estipular claramente asuntos como los conflictos de intereses de sus miembros.

- **Periodo de observaciones.**

Una vez que el “Oversight Board” lleve algunos meses de funcionamiento, debe establecerse explícita y públicamente un periodo para hacer observaciones a su funcionamiento, de tal forma de tener información de todas las regiones que permitan ajustar y mejorar este mecanismo. Este periodo de observaciones debe ser abierto y participativo. Sus resultados deben ser públicos, con la información completa sobre la determinación de qué ajustes hacer, así como un plazo adecuado para llevarlos a cabo. Debe, asimismo, contemplarse un mecanismo de observación periódica sobre el funcionamiento del “Oversight Board”, con características de transparencia y publicidad.

...

Este documento fue firmado el 7 de junio del 2019 por las siguientes organizaciones:

- R3D: Red en Defensa de los Derechos Digitales, México
- Fundación Karisma, Colombia
- Asociación por los Derechos Civiles (ADC), Argentina
- Coding Rights, Brasil
- Derechos Digitales, América Latina
- Hiperderecho, Perú
- Ipandetec, Panamá.
- Tedic, Paraguay.



## Facebook Oversight Board: A Perspective from Latin America and the Caribbean

The organizations signing this document are part of the consortium belong to “Al Sur”, an organized group from civil society in Latin America that seeks to strengthen human rights in the digital environment. The main reason for this statement is to present our joint comments to the public call made by Facebook to contribute to its document “Draft Charter: An Oversight Board for Content Decisions” (<https://fbnewsroomus.files.wordpress.com/2019/01/draft-charter-oversight-board-for-content-decisions-2.pdf>).

The “Oversight Board” has been proposed by Facebook as an independent body to which people can appeal Facebook’s content moderation decisions. This initiative was born after intense criticism in the world (including, of course, critical views coming from Latin America and the Caribbean), about the lack of transparency with which Facebook develops and applies its community standards, affecting the use of the platform for disinformation campaigns, incitement to different forms of violence, etc.

We appreciate that a platform as important as Facebook has decided to finally open a discussion on the urgent need to change the way in which content moderation has been handled up to these days. But, as we will see below, we believe that this “Oversight Board” can and should have a more active role producing a dialogue between the rules of Facebook community and human rights standards. Moreover, its decisions must have the final aim of improving the community guidelines and the procedures to apply them. We also propose advancing decisively in the representativeness of regions in its members (such as Latin America and the Caribbean) as well as the transparency in their functions.

Thus, our recommendations are summarized in five points:

- **Scope of its mandate**

Regardless its final structure or organic form that acquires, and in order to satisfy its legitimacy and the possibility of fulfilling its mandate, we believe that the ultimate scope of the “Oversight Board” should be making recommendations of changes to the company’s community guidelines and its procedures for applying them, building a dialogue between the international human rights standards and the community rules of the company.

Thus, we suggest a change from the original idea described in the draft delivered by Facebook, proposing instead that the “Oversight Board” has the power to directly impact over the regulatory design of platform content policies. We understand that to properly fulfill this role, the “Oversight Board” can and should analyze specific illustrative cases, especially the most complex and difficult ones. It even should suggest changes to decisions with reparatory effects for those specific cases. However, its main objective should be propose improvements to the policies and procedures on how the company makes decisions regarding the moderation of content, having the ability to establish what should be the process to be followed (step by step), based on what has already been developed on the subject by the international human rights standards. For example, carrying out an analysis and weighing of rights in adherence to tests of necessity, proportionality and suitability.

In this proposal, it is important to rethink the inputs with which the “Oversight Board” will have to do its work. While illustrative cases may not necessarily notice worrying trends in content moderation on time, we propose the addition of other instances where specialists in the field -with knowledge of relevant regional contexts- may present worrying trends in the use of content moderation, which could affect specific groups that, due to their vulnerability or other factors around marginalization, cannot or do not want to access to this mechanism.

From this perspective, we believe it is essential that the “Oversight Board” assume three urgent tasks:

- 1. Algorithmic transparency.** Many of the decisions that affect the community rules and, thus, the content moderation, have an impact over algorithmic decisions behind particular contents. This type of automated decisions is opaquer than the removal of content per se (the explanations of how they work and how they avoid false positives are rather non-existent) and, therefore, affect freedom of expression in the same way.
- 2. Formal aspects of decision making.** It is urgent that a technical, representative and independent body such as the “Oversight Board” can make recommendations about formal aspects in the decision-making process of content moderation, as these affect the results of the mechanism. Many aspects must be rethought, as the way in which users are notified when their content was removed, the moderators’ resume and its working conditions, etc.
- 3. Appeal mechanisms.** We also believe that it’s important for Facebook to urgently assume the task of reinforcing common appeal mechanisms that users can have, adopting due process criteria and suggestions from human rights standards that the “Oversight Board” itself can recommend.

Likewise, the limited scope of the “Oversight Board” must be explicit for the users in two senses: (1) the role of justice and analysis of human rights violations continue to be a task of the State, adhered to the local context, and (2), the tasks of the “Oversight Board” will not replace the appeal mechanisms over the rest of the content moderation (which, as we stated earlier, it is urgent to improve them).

Preferably, the “Oversight Board” decisions must be binding in the first instance: this would favor the legitimacy of its establishment and the confidence of the users regarding its function, since its implementation would not be in the company’s sole discretion. However, if Facebook decides that this is not the case, it should at least ensure a thorough and documented explanation to the “Oversight Board” of their reasoning in those decisions.

- **Human rights over corporate values**

We believe that the idea that the “Oversight Board” responds to the “values” of the company should be left behind. Rather, decisive progress must be made so that its main criterion be international human rights standards instead.

The “values” of a company represent only its organization and its business culture (which are also limited to a cultural tradition). For this reason, by no means should these “values” be the standard norm for the “Oversight Board” decisions.

Likewise, the legitimacy and effectiveness of the “Oversight Board” is in doubt if its decisions are based on the “values” or “standards” set by the same platform. The best way to fulfill the aspiration of impartiality and independence in the decisions of this instance, and to generate greater confidence in this regard, is to adhere to a process that has already been established and elaborated by existing international human rights standards (as our

Inter-American Human Rights System), which could allow transparent and replicable decisions.

- **Geographical scope, diversity and selection criteria**

Facebook proposes a global “Oversight Board” with commitment to “diversity” and an approximate number of 40 people as its members. In this sense, and as part of a community of the Global South and, even more particularly, of Latin America and the Caribbean, we believe that it is important to guarantee the diversity of the members as well as its technical expertise.

From the point of view of diversity, it is necessary a composition with gender and ethnic balance. In addition, we believe that its composition must have a proportional representation according the number of users that Facebook has in each region and its growth projection. In the same way, members must come from multidisciplinary fields in order to deliver diverse visions to the problems.

From the point of view of technical expertise, members from each region should comply with clear and transparent standards of professional suitability as, for example, demonstrated experience in human rights issues and freedom of expression. These criteria must be proposed and reviewed publicly, so that they are suitable and feasible to comply with in

all regions and should be transparent to the community in order to improve the accountability of selected members.

- **Internal regulation and independence.**

The independence of the “Oversight Board” should be guaranteed by Facebook. That implies autonomy of this body to determine the ways in which they will work, communicate and the rules with which they will be governed.

In this sense, one of the first “Oversight Board” tasks should be to work on a code of conduct proposal that includes complaints handling and decision-making processes. This document must be submitted to an open consultation. Its final version must be public, in order to improve transparency and accountability of the board. We believe it is important that, in particular, the code of conduct should clearly stipulate matters such as conflicts of interest of its members.

- **Period of observations.**

Once the “Oversight Board” has some months in operation, a period must be established explicitly and publicly to make observations on its work, in such a way to have information of all the regions that allow to adjust and improve this mechanism. This period of observations must be open and participatory. The results should be public, with complete information on the determination of what adjustments to make, as well as an adequate time to carry them out. It should also be considered a mechanism for periodic observation of the “Oversight Board” operations, with characteristics of transparency and publicity.

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This document was signed on June 7th, 2019, by the following organizations:

- R3D: Red en Defensa de los Derechos Digitales, Mexico
- Fundación Karisma, Colombia
- Asociación por los Derechos Civiles (ADC), Argentina
- Coding Rights, Brazil
- Derechos Digitales, America Latina
- Hiperderecho, Peru
- Ipandetec, Panama
- Tedic, Paraguay

## Borrador de carta estatutaria: Junta supervisora de decisiones sobre contenidos

### **1) Pregunta: ¿Cuál es el número correcto de miembros con vistas a equilibrar la capacidad para trabajar en equipo y la necesidad de maximizar la diversidad en cuanto a experiencia profesional y bagaje cultural?**

*Consideraciones: Un grupo más pequeño (p. ej. 20) mantendría a los miembros enfocados, con una mayor percepción de identidad como grupo y compañerismo, mientras que un grupo más grande (p. ej. 100) permitiría mayor diversidad de perspectivas.*

Enfoque sugerido: La junta estará conformada por un conjunto diverso de hasta 40 expertos internacionales.

**JGR: Debe ser un número no muy grande de manera que este órgano colegiado, la Junta supervisora, no funcione como un parlamento y se limite a votar decisiones adoptadas de antemano, en vez de razonar y decidir colegiadamente sobre argumentos y estándares objetivos que creen precedentes para casos futuros. Esta posición hace que no sea aconsejable un número tan elevado como 100 miembros. Por otro lado, si debe ser una comisión internacional y de composición plural no cabe un número muy reducido para permitir incorporar expertos de diversos países, lenguas y formaciones. También debe ser un colectivo suficientemente amplio para dividir el estudio de las quejas y consultas. Con estas pautas, el número de no más de 40 miembros que se propone podría ser acertado. Pero puede incluso no cubrirse inicialmente si no hiciera falta; depende del número de expertos que aseguren autoridad y representatividad.**

**Traduction:** It must be a very small number so that this collegial body, the supervisory board, does not function as a parliament and limits itself to voting decisions adopted beforehand, instead of reasoning and deciding collegially on objective arguments and standards that create precedents for cases futures. This position makes a number as high as 100 members not advisable. On the other hand, if there is to be an international commission with a plural composition, there is not a very small number to allow the incorporation of experts from different countries, languages and formations. It should also be a sufficiently large group to divide the study of complaints and consultations. With these guidelines, the number of no more than 40 proposed members could be successful. But it may not even be covered initially if it were not necessary; It depends on the number of experts that ensure authority and representativeness.

### **2) Pregunta: ¿Cómo podrían elegirse los primeros miembros de la junta de una forma que sea transparente y razonable?**

*Consideraciones: Facebook podría encomendar las designaciones iniciales a un presidente o un comité de selección (en lugar de que las haga Facebook directamente); sin embargo, la selección de esa persona o comité plantearía sus propios desafíos.*

Enfoque sugerido: Facebook seleccionará a los integrantes del primer grupo de expertos en base a una revisión de cualificaciones que se hará pública. Se prestará especial atención al equilibrio geográfico y cultural, así como a la diversidad de perspectivas y formaciones.

**JGR. Un comité de selección, formado por Facebook, que revise los méritos de los expertos y mantenga un equilibrio entre distintas sensibilidades y formaciones me parece un buen sistema, si se mantiene efectivamente un pluralismo territorial y cultural.**

A selection committee, formed by Facebook, that reviews the merits of the experts and maintains a balance between different sensitivities and formations seems to me a good system, if a territorial and cultural pluralism is effectively maintained.

**3) Pregunta: ¿Cómo deberían hacerse las selecciones futuras para garantizar que se mantengan los niveles de diversidad, experiencia profesional e independencia?**

*Consideraciones:* Las siguientes selecciones deben equilibrar la necesidad de independencia de la junta con la necesidad de que los miembros reflejen la diversidad de la comunidad de Facebook. Facebook podría proponer miembros para que la junta ratifique su elección a través de votaciones, la junta podría recomendar candidatos a Facebook o el proceso podría ser una combinación de diferentes prácticas.

*Enfoque sugerido:* Una vez que esté en funcionamiento, la junta será responsable de las futuras selecciones de miembros. Facebook podrá proponer miembros, pero la junta deberá aprobarlos. Ningún miembro de la junta podrá ser destituido por Facebook a menos que haya quebrantado los términos de su designación.

**JGR. Que los miembros de la Junta Supervisora sean inamovibles es una garantía clásica de su imparcialidad e independencia, salvo infracciones graves al futuro estatuto o reglamento de sus miembros. Puede ser correcto que, en el futuro, la Junta incorpore los nuevos miembros, pero también lo sería que simplemente apruebe o ratifique las propuestas de la comisión de selección que en esta primera ocasión se cree. Que la Junta revise el baremo y la ponderación de los méritos realizado por la comisión de selección puede asegurar la bondad de la decisión.**

That the members of the Supervisory Board are irremovable is a classic guarantee of their impartiality and independence, except serious infractions to the future statute or regulation of its members. It may be correct that, in the future, the Board incorporates the new members, but it would also be correct if it simply approves or ratifies the proposals of the selection committee that is created on this first occasion. That the Board reviews the scale and the weighting of the merits made by the selection committee can ensure the goodness of the decision.

**4) Pregunta: ¿Cuánto debe durar el mandato de cada uno de los miembros?**

*Consideraciones:* Unos mandatos más largos les permitirían a los miembros desarrollar más experiencia en la toma de decisiones sobre contenidos en Facebook, mayor familiaridad con la revisión de los contenidos de Facebook y tiempo para contribuir a la junta. Por otro lado, los mandatos más cortos garantizarían que la junta contara con perspectivas frescas entre sus miembros. *Enfoque sugerido:* Los miembros trabajarán a tiempo parcial por un plazo fijo de tres años. Su mandato podrá ser renovados automáticamente una vez.

**JGR. Debe ser un plazo breve por la naturaleza del asunto, tres años es un plazo razonable, inferior a una legislatura. También es bueno permitir la renovación. Pero quizás adquirir familiaridad con los temas llevará algo de tiempo al principio hasta que existan un conjunto de estándares, precedentes y criterios para la decisión de los casos. Por estas razones, tampoco sería una mala opción, un poco más, acaso cuatro años. Que quepa una renovación es muy lógico en un órgano arbitral y técnico, para aprovechar la experiencia de sus miembros, tanto como que se prohíba una segunda renovación que supondría una duración excesiva y congelaría en exceso la composición del órgano.**

It must be a short term due to the nature of the matter, three years is a reasonable term, less than a legislature. It is also good to allow renewal. But perhaps acquiring familiarity with the topics will take some time at first until there are a set of standards, precedents and criteria for deciding the cases. For these reasons, it would not be a bad option either, a little more, maybe four years. That a renewal fits is very logical in an arbitral and technical body, to take advantage of the experience of its members, as well as to prohibit a second renewal that would mean an excessive duration and would excessively freeze the composition of the body.

**Revisión independiente de las decisiones sobre contenidos**

La principal función de la junta es revisar decisiones específicas que tomamos al hacer cumplir nuestras normas comunitarias. La junta basará sus decisiones en estas normas y en un conjunto de valores, los cuales incluirán conceptos como la voz, la seguridad, la equidad, la dignidad, la igualdad y la privacidad. Las decisiones de la junta serán vinculantes sobre contenidos específicos objeto de revisión y podrán dar pie a nuevas políticas. La junta no decidirá casos en los que el hecho de revertir la decisión de Facebook pudiera quebrantar la ley. Facebook puede incorporar las decisiones de la

junta en el proceso de desarrollo de sus políticas. Además, Facebook podrá solicitar asistencia a la junta para la creación de políticas.

#### **5) Pregunta: ¿Cómo deberían llegar las solicitudes a la junta?**

*Consideraciones:* Facebook toma millones de decisiones semanalmente respecto a qué contenidos pueden estar o no en la plataforma. No es realista pensar que la junta podrá revisar cada decisión con la que alguien no esté de acuerdo. Facebook podría, por ejemplo, instaurar un mecanismo público de peticiones para filtrar las solicitudes a ser consideradas por la junta. Facebook podría, además, llevar los casos difíciles a la junta.

*Enfoque sugerido:* Las preguntas serán referidas a la junta por usuarios de Facebook que no estén de acuerdo con una decisión, así como por el mismo Facebook. Facebook también referirá decisiones sobre contenidos a la junta para su consideración cuando: considere casos específicos especialmente difíciles de resolver; encuentre que temas recurrentes han generado discusiones y debates públicos significativos; o cuando políticas existentes o las prácticas para hacerlas cumplir parezcan llevar a demasiadas decisiones que contradigan los valores de Facebook.

**JGR. No debería haber un acceso directo de los usuarios para no colapsar a la Junta con un número muy elevado de preguntas o quejas. Es pues correcto que Facebook realice un primer filtro antes de llegar al arbitraje de la Junta. También lo es que el propio Facebook puede pedir su opinión a la Junta consultándola donde un problema reclame una interpretación del asunto, se estime un caso difícil, se produzca una serie de casos repetitivos, o una disfunción sistémica o generalizada, o simplemente malas prácticas.**

**Más problemático es ordenar una forma de apelación de los usuarios que no estén de acuerdo con la decisión de Facebook, porque puede convertirse en un recurso generalizado y colapsar a la Junta con quejas. Sugiero que las reclamaciones contra decisiones de Facebook sólo se eleven a la Junta cuando planten una cuestión de trascendencia general y no sean repetitivas; podría construirse un criterio parecido, salvando las distancias evidentes, al que se usa para la admisión o la inadmisión de los amparos constitucionales por el Tribunal Constitucional español y alemán y los accesos directos ante el Tribunal Europeo de Derechos Humanos en ambos casos protegiendo derechos fundamentales.**

There should not be a direct access of the users so as not to collapse the Board with a very high number of questions or complaints. It is therefore correct that Facebook makes a first filter before reaching the Board's arbitration. It is also true that Facebook itself can ask the Board for its opinion by consulting it where a problem demands an interpretation of the matter, a difficult case is considered, a series of repetitive cases occurs, or a systemic or generalized dysfunction, or simply bad practices.

More problematic is to order a form of appeal from users who do not agree with the decision of Facebook, because it can become a widespread resource and collapse the Board with complaints. I suggest that the claims against Facebook decisions only be raised to the Board when they raise a question of general importance and are not repetitive; a similar criterion could be constructed, saving the obvious distances, to which is used for the admission or inadmissibility of the constitutional protections by the Spanish and German Constitutional Court and the direct accesses before the European Court of Human Rights in both cases protecting fundamental rights.

#### **6) Pregunta: ¿Cómo debería la junta seleccionar los casos específicos a considerar a partir de las solicitudes que recibe?**

*Consideraciones:* Separar a los miembros que escogen los casos de los que toman las decisiones puede ayudar a garantizar que las decisiones no vengan predeterminadas desde su selección, a la vez que permitiría a la junta seleccionar sus propios casos. Otro enfoque sería convocar periódicamente a toda la junta para seleccionar una lista de casos a ser revisados en un plazo específico.

*Enfoque sugerido:* Los casos serán escuchados por comités formados por un grupo rotativo de un número impar de miembros. Los comités que se reúnan para decidir casos podrán, al final de su sesión, escoger un grupo de casos elegibles para que los decidan comités posteriores. Una mayoría de ese comité debe acordar seleccionar un caso.

**JGR. Además de este criterio procedimental, una sección o comité de inadmisión y otra de decisión sobre el fondo, creo deben crearse unos mínimos criterios de admisión, abstractos o generales, predeterminados y que se den a conocer con publicidad como son los que he indicado en la respuesta anterior. Es un problema semejante al del amparo constitucional y el *direct acces* en Estrasburgo, salvando las distancias.**

**Si las quejas fueran muchas habría que hacer una única sección de admisión y enjuiciamiento al tiempo por razones de eficacia y rapidez, aunque se perdiera en garantías. Al cabo la Junta debe ser una autoridad independiente y no son precisas tantas garantías como en un proceso judicial.**

In addition to this procedural criterion, a section or committee of inadmissibility and another decision on the merits, I believe should be created minimum admission criteria, abstract or general, predetermined and that are disclosed with publicity such as those I have indicated in the previous answer. It is a problem similar to the constitutional protection and direct access in Strasbourg, saving the distances.

If the complaints were many, a single admission and prosecution section would have to be made at the same time for reasons of efficiency and speed, even if it were lost in guarantees. After all, the Board must be an independent authority and there are not as many guarantees as in a judicial process.

**7) Pregunta: ¿Cómo puede la junta garantizar la sensibilidad cultural a la vez que emite decisiones que afectarán a 2.3 mil millones de personas en el mundo?**

*Consideraciones: La junta no puede, en la práctica, incluir a personas de todos los países, idiomas y culturas.*

*Complementar la experiencia profesional de los miembros a través de consultas con expertos geográficos y culturales ayudaría a garantizar que las decisiones sean realmente informadas. Esta no es una solución perfecta y podrían ser necesarios enfoques adicionales para mejorar en ciertas áreas específicas.*

Enfoque sugerido: Igual que Facebook, la junta podrá recurrir a expertos para garantizar todos los conocimientos lingüísticos, culturales y sociopolíticos necesarios para tomar una decisión. Facebook, con la ayuda del personal de la junta, garantizará que ésta disponga de todo el material relevante en poder de Facebook cuando este tomó su decisión. Los usuarios de Facebook y las partes interesadas pertinentes también pueden presentar argumentos y materiales a la junta.

**JGR. Comparto el enfoque sugerido.**

I share the suggested approach

**8) Pregunta: ¿Cómo puede Facebook garantizar que los miembros de la junta trabajan con independencia?**

*Consideraciones: Facebook tiene el compromiso de proteger a los miembros de la junta para que puedan trabajar de forma independiente, sin influencia inapropiada o indebida de Facebook o cualquier otra fuente externa en su proceso de revisión de las decisiones tomadas por Facebook. Los miembros deben sentirse seguros e independientes de cualquier influencia externa, incluidas las influencias de carácter monetario. Facebook proporcionará recursos para financiar a la junta; sin embargo, podría hacerlo a través de una entidad separada a fin de preservar la independencia de los miembros.*

Enfoque sugerido: Debido a que la imparcialidad es algo fundamental, la junta no incluirá a empleados actuales, exempleados ni empleados contingentes de Facebook, ni a funcionarios gubernamentales. Las remuneraciones de los miembros de la junta serán estandarizadas, se fijarán antes del plazo de sus funciones y se mantendrán sin cambios durante su permanencia en la junta. Los miembros de la junta no serán presionados ni recibirán incentivos para favorecer a persona alguna cuyo caso esté en revisión por parte de la junta y los miembros deben retirarse si tienen algún conflicto de interés. Si bien los nombres de los miembros de la junta serán de dominio público para garantizar la transparencia, no se asociarán nombres de miembros individuales a decisiones particulares. Los miembros se comprometerán a no revelar las deliberaciones privadas excepto lo expresado en las explicaciones y decisiones oficiales de la junta.

**JGR. El enfoque sugerido garantiza bien el estatuto de los miembros de la Junta mediante diversas herramientas: expertos independientes, de reconocido prestigio profesional y no vinculados directa o**

**estrechamente a la empresa, retribuciones predeterminadas y fijas, imposibilidad de su revocación, deber de sigilo o confidencialidad respecto de la deliberación. Añadiría a estas garantías que las decisiones de la Junta deberán ser motivadas de forma sucinta o por reenvío a decisiones previas. El razonamiento o la motivación es la principal garantía de la objetividad e imparcialidad de las decisiones. Pero debe ser escueto como corresponde a un árbitro y no a un tribunal. La primera Junta debe fijar un estilo de las resoluciones.**

The suggested approach guarantees the status of the members of the Board through various tools: independent experts, of recognized professional prestige and not directly or closely linked to the company, predetermined and fixed remunerations, impossibility of revocation, duty of secrecy or confidentiality. of deliberation. I would add to these guarantees that the decisions of the Board should be motivated succinctly or by re-sending them to previous decisions. Reasoning or motivation is the main guarantee of the objectivity and impartiality of decisions. But it must be brief as befits an arbitrator and not a court. The first Board should set a style of resolutions.

**9) Pregunta: ¿Qué garantizará el compromiso de la junta con su propósito y sus valores?**

*Consideraciones: Ejercer juicios independientes mientras se mantiene un conjunto de principios es algo tanto posible como necesario. Los valores abarcarían conceptos como la voz, la seguridad, la equidad, la dignidad, la igualdad y la privacidad. La legitimidad pública de la junta crecerá a partir de la toma de decisiones transparentes e independientes.*

Enfoque sugerido: Facebook publicará una carta estatutaria que servirá como base para el funcionamiento de la junta, la cual incluirá un conjunto de valores. La carta estatutaria especificará los compromisos de Facebook ante la junta y la autoridad de la junta. Los miembros de la junta aceptarán los valores descritos en la carta estatutaria y definirán el compromiso de la junta ante las personas que utilizan Facebook.

**JGR. Comparto la propuesta. Pueden aprobarse unas *guide-lines*, directrices o recomendaciones, que orienten las decisiones de la Junta y especifiquen los valores que quieren preservarse. Efectivamente la Junta tendrá un legitimidad de ejercicio por la razonabilidad de sus decisiones**

I share the proposal. Guidelines, guidelines or recommendations can be approved, which guide the decisions of the Board and specify the values that they want to preserve. Effectively the Board will have legitimacy of exercise for the reasonableness of its decisions

**10) Pregunta: ¿Cuál es el nivel de transparencia correcto para dar al público una comprensión del razonamiento de la junta a la vez que se protege la seguridad y la privacidad de los usuarios y los miembros de la junta?**

*Consideraciones: El resultado de toda decisión de la junta debe ser público, aunque debe protegerse la privacidad de los usuarios. Sin embargo, los contenidos que la junta decida que no deben estar en Facebook no deben recibir una distribución más amplia. Por otro lado, algunas decisiones que puedan ser polémicas o controvertidas, podrían involucrar inquietudes de seguridad para los miembros de la junta y, en estos casos, también debe considerarse su privacidad y seguridad.*

Enfoque sugerido: Las decisiones de la junta se harán de dominio público con todas las protecciones de la privacidad apropiadas para los usuarios. La junta tendrá dos semanas para emitir una explicación para cada decisión. Las explicaciones se emitirán en nombre de la junta y no serán atribuidas a miembros individuales. Si una decisión no es unánime, un miembro de la minoría puede incluir su opinión como parte de la explicación que se comparta.

**JGR. De acuerdo con la publicidad de las decisiones. También con su atribución colegiada a la Junta sin que aparezca el nombre del ponente o de los miembros que firman la resolución para preservar su intimidad y privacidad frente a ataques en las redes sociales. Es igualmente razonable que existan votos particulares u opiniones disidentes o concurrentes, pero todo ello debe ser sobrio y escueto en la argumentación. No me parece adecuado el nombre “explicación” respecto de las decisiones de la Junta. Es una decisión, o resolución, porque decide un asunto y no sólo una explicación u opinión.**

**Quizás podrían distinguirse dos tipos de resoluciones de la Junta, las “decisiones”, que resuelvan un tema;**



**y las “opiniones” que expresen un criterio sobre una consulta de carácter general. Habría que precisar estos términos en inglés para evitar equívocos.**

According to the publicity of the decisions. Also with its collegial attribution to the Board without appearing the name of the speaker or the members who sign the resolution to preserve their privacy and privacy against attacks on social networks. It is equally reasonable that there are particular opinions or dissident or concurrent opinions, but all this must be sober and concise in the argumentation. I do not think the name “explanation” for the decisions of the Board is appropriate. It is a decision, or resolution, because it decides a matter and not just an explanation or opinion.

Perhaps two types of Board resolutions could be distinguished: “decisions” that resolve a topic; and “opiniones” that express a criterion about a general query. It would be necessary to specify these terms in English to avoid misunderstandings.

**11) Pregunta: ¿Cómo debe la junta garantizar la coherencia, en vista de que las decisiones de diferentes casos y comités podrían resultar en conclusiones inconsistentes?**

*Consideraciones: Facebook es, en última instancia, responsable de tomar decisiones respecto a sus políticas, sus operaciones y su aplicación. Al mismo tiempo, podría desarrollarse algún mecanismo mediante el cual la totalidad de la junta o un comité de esta se reúna para revisar decisiones de casos que impliquen a diferentes políticas a fin de garantizar la consistencia de su aplicación.*

Enfoque sugerido: Cada comité que decida casos se asegurará de que exista consistencia con otras opiniones emitidas antes de tomar su decisión final. Otros miembros de la junta tendrán también la oportunidad de revisar la decisión del comité a fin de garantizar su consistencia y coherencia.

**JGR. Debe haber un repertorio o registro centralizado de todas las decisiones y opiniones que los miembros de la Junta puedan consultar para adecuar sus decisiones a los precedentes. Es también una forma de asegurarse de que no existen contradicciones en las decisiones por distintas secciones o comités.**

**Si existieran diversidad de opiniones o contradicciones entre las secciones o comisiones las mismas deberán reenviar o deferir su decisión a un gran sección formada por más miembros o al pleno quien también podrá avocar para sí la decisión.**

There must be a centralized repertoire or record of all decisions and opinions that Board members can consult to adapt their decisions to the precedents. It is also a way to ensure that there are no contradictions in decisions by different sections or committees. If there is a diversity of opinions or contradictions between the sections or committees, they must forward or defer their decision to a large section formed by more members or the plenary session, which may also decide for itself.

Facebook studied the range of oversight models that exist globally. The resulting report reviews community and institutional mechanisms for decision oversight, as well as a range of judicial and quasi-judicial models.

## Oversight of Deliberative Decision-making: An Analysis of Public and Private Oversight Models Worldwide

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### Abstract

Over the last several years, companies seeking to understand how to appropriately moderate content have grappled with a range of complex social and political issues. In November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention of creating a mechanism for external review and input on decisions about what violates Facebook Community Standards by building an “independent body, whose decisions would be transparent and binding.” To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. We categorized these systems and divided them into general “families” of oversight design, which are: investigative institutions; supervisory institutions; arbitral adjudication processes, administrative adjudication bodies, national judicial systems, including both European continental-style appellate courts and American appeals courts, and international judicial systems. We analyzed each of these families along the dimensions of autonomy of process, validity and salience of information considered, procedural fairness, transparency, and executability of outcome. Comparing these different families yields three high level findings: *First*, that despite their differences, these families operate on a similar framework where design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body’s recommendation or advice). *Second*, within this framework, institutions must make trade-offs in key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. These trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. *Third*, there is no ‘silver bullet’ for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underlying priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions.

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## Executive Summary

Over the last several years, companies seeking to understand how to appropriately moderate content have grappled with a range of complex social and political issues. The primary issue under debate was how Facebook determined whether a specific piece of content (or account) violated its existing rules, called the “Community Standards.” In building the policies themselves, Facebook has sought to seek community and expert input in a range of formal and informal ways. However, the decision on whether something violated these standards was ultimately Facebook’s decision. In November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention of creating a mechanism for external review and input on decisions about what violates Facebook Community Standards by building an “independent body, whose decisions would be transparent and binding.” As part of the effort to develop this body, Facebook engaged in a six-month process which included meeting with a wide range of organizations – from think tanks and researchers to community and advocacy groups – as well as a public input process to seek feedback and concrete suggestions on potential designs. The goal of these engagements was to determine how best to empower this entity to render independent judgment on some of Facebook’s most important and challenging content decisions.

To better understand the range of oversight models that exist globally, in parallel to these engagement efforts we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary Ombudsman, the general features of Civilian Review Boards for U.S. policing and U.S. corporate board audit committees, hospital and press oversight entities, the Indian Panchayat systems, and the Pacific Coast ILWU labor grievance arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura.). We categorized these systems and divided them into general “families” of oversight design, which are as follows:

- *Investigative institutions* focus less on providing a forum for substantive review of prior rulings and more on providing internal insight and public transparency into contested decisions. These include a range of structures from incident-based reviews common in hospital and law enforcement contexts to Inspectors General and financial audits. There are some notable media and governmental examples of these types of institutions in the forms of public editors or ombudspersons. These bodies typically do not have direct decision-making authority, but rather use their capacity to investigate and criticize the internal operations of decision-makers to generate accountability.
- *Supervisory institutions* focus on providing advice and occasionally oversight on key decisions. This includes a range of structures more common in the private and academic sectors such as corporate boards and institutional or ethical review boards. Like the investigative models, these institutions may review and govern specific decisions but may not (depending on the organizational context) have the authority to make rules to govern decisions prospectively. Unlike investigative models, these institutions are typically vested with some authority to prevent specific decisions on a case by case basis---a university Institutional Review Board, for example, may forbid a researcher from conducting research it deems to be unethical.
- *Arbitral* adjudication processes are broadly characterized by the distinctive goal of resolving disputes from within an ongoing valuable relationship, rather than by appeal to some external authority, in the interests of preserving that relationship and generating consensus. Within this family, there are two broad sub-classes:
  - *Institutional arbitral* processes are ones developed within and between disputing parties with the aim of resolving disputes through some common, agreed upon arbitrator. This sub-class captures the broad range of alternative dispute resolution processes commonly used in commercial, labor, and other contexts in an effort to avoid an appeal to more formal or governmental authority.
  - *Community-based adjudication* processes are common in post-colonial areas, including Latin

America and South and Central Asia. Examples include the Indian panchayat and shura systems and the jirga systems in Afghanistan. These systems typically rely on community leaders and members to adjudicate conflicts within the context of local norms, community ties, and agreed-upon authority vested by the community.

- *Administrative adjudication bodies*, such as, in the U.S., the Social Security Appeals Council and the Board of Immigration Appeals, are characterized by members' close relationships to the agencies they supervise in terms of goals and career trajectories as well as relatively specialized knowledge and information about the administrative issues under debate.
- *National Judicial Systems* are charged with addressing disputes and rendering rulings on cases of individuals based on formal national law. In this category we consider two sub-families:
  - *European continental-style appellate courts* are characterized by features like strong internal advocates, high-volume caseloads, and brief and conclusory rulings, and typically understood as having the core purpose of correcting individual incorrect decisions from below.
  - *American appeals courts*, in particular the U.S. Supreme Court as the most salient and extreme case, are characterized by elite judges who issue highly developed legal rulings and exercise vast power over their own elected government as well as practical outcomes and downstream effects, and are chosen by a concomitant highly politicized appointments process.
- *International Judicial Systems* are established to adjudicate disputes based on an agreed upon set of international laws or norms. Examples include the international human rights courts, international trade courts, and international criminal courts. These bodies are characterized by appointment from participant states, sometimes in ways that undermine institutional functioning or are perceived as threatening state sovereignty, and strong staff case screening functions.

These different institutions are all aimed at providing meaningful oversight on a deliberative decision-making process in a way that is accepted both institutionally and more broadly in the general public. To that end, despite variation in the design and execution, the families can be assessed and compared using a common set of dimensions: autonomy, validity, salience, and procedural fairness. When effectively managed, the design and execution features will yield decisions that produce two outputs: fair and accurate decisions that are operationally feasible. It is worth noting, though, that the degree to which these processes seek one of these outcomes over the others will vary based on the core function of the institution. Indeed, a systematic comparison of these families and associated institutions indicates that there is no 'perfect system' – all the systems involve trade-offs and require prioritization based on overall goals. However, even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner. Some key findings from the analysis of these oversight "families" highlight certain operational structures and barriers encountered in administering oversight functions as boards and hierarchical bodies such as:

- *Staff functions* within oversight bodies vary from the lightest-responsibility-staff model whose role consists of receiving paperwork and budgeting, to the highest-responsibility-staff models who may go so far as to render preliminary resolutions of disputes which may be accepted wholesale by the board. Staff roles can be either administrative (akin to civil servants) or functional (such as law clerks).
  - There are several models of *staff accountability and reporting requirements* which range from direct reporting to boards and judges at a district level to reporting to international, hierarchical or bureaucratic committees.
  - The extent of the *role staff play* in the decision-making of boards has been the subject of public concern, where "a strong staff," i.e. staff who produce opinions, draft decisions or select cases may

be seen as exercising undue influence on decisions of boards or courts.

- *Workload management* is a key challenge in all boards which receive disputes from the public. Boards adopt a variety of strategies to mitigate it, primarily various versions of staff pre-screening (potentially empowering the screeners), multi-stage review (potentially sacrificing procedural justice and access to the dispute resolution mechanism) or the proliferation of sub-panels to hear a large volume of cases (potentially sacrificing consistency).
- *Board member selection* processes among bodies reviewed often place considerable emphasis on traits such as competence, status, representativeness, neutrality, and commitment. There are some internal tensions with these traits, for example, representative boards may lack status and competence. Different methods of board selection place different levels of emphasis on different combinations of these traits. Board member selection often takes forms such as selection by representative institutions, selection by the organization to be overseen, or selection by outside experts.
- *Decisional and process transparency of boards* are a frequent challenge. Bodies undertaking arbitration are often restricted by confidentiality while larger bodies may be subject to a large volume of cases in which full articulation and publication would impinge upon their functionality, resulting in cases often being unpublished summaries or gnomonic rulings.
- *The downstream effects of decisions* vary among boards on a spectrum from the U.S. Supreme Court, which establishes a strong and formally binding body of precedent in which it makes new rules of law binding on all actors, to one-off arbitrations in which entities that lack institutional memory are unable to exercise influence beyond the specific dispute presented to them. Boards with varying degrees of articulation, transparency, and motivation to produce a consistent body of decisions occupy intermediate points on this spectrum.

Based on this research, there are several relevant findings for Facebook's consideration in the design and implementation of the Board. The core finding is that key design issues can drive longer-run legitimacy. Design features of particular importance include:

- *Board Member Selection, Membership Terms, and Support Staff:* A common design goal is to insulate board members from undue influence by appointing authorities or other powerful actors in order to ensure, to the maximum extent possible, that their decisions will be influenced only by the relevant rules and principles according to which they decide. Common danger vectors of undue influence include:
  - *External control over board member salary and long-term career prospects.* Various board structures attempt to ameliorate this influence by providing for long and nonrenewable terms for board members and fixed salaries for board members.
  - *Politicized appointment processes creating an internal tension between the goals of stakeholder representation and decisional neutrality.* Various board structures attempt to ameliorate this influence by including neutral experts in the appointments process, such as judicial nominations commissions, or working to include partisan and stakeholder balance and representation on ultimate panels.
  - *Domination by staff.* Several board structures have struggled with managing their workloads without ceding too much responsibility to staff who may have lower qualifications, may be appointed through a less careful process, or may have differing incentives from board members. Typical strategies to ameliorate this risk have included reducing the workload per board member-hour (by increasing board members or board member hours or reducing caseload) or accepting the influence of staff and adopting rigorous appointment processes to attempt to ensure that the influence they exercise is high-quality and neutral.

- *Workload management and transparency.* All of the boards that receive cases from the general public which we examined struggle with workload management. There is an inherent tradeoff between the capacity to provide full and unbiased access to dispute-resolution procedures and the capacity to provide consistent, well-articulated, and autonomous decisions that represent the full reasoning capacity of the board.
- *The influence of decisions on downstream policy.* Different cultures and organizational contexts have made very different decisions about whether oversight boards should have the capacity to set overall organizational policy, such as by making precedent-setting decisions in the judicial context or directly setting policy in the corporate and other intra-organizational context. The capacity to set policy may provide benefits in the creation of an adjudicative process that is perceived as fair and effective at incorporating abstract principles of equity into organizational decisions, but may come at the cost of reducing organizational policy autonomy and potentially promoting “judicial activism” and efforts by interested parties to exercise undue influence over the selection of board members (“politicization”).

Ultimately the findings of this research serve more as a starting point to inform and develop a base of critical consumers of oversight in the context of social media and internet-mediated communication and services. In that context, comparing these different families yields three key take-aways. *First*, that despite their differences, these families operate on a similar framework where a combination of design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body’s recommendation or advice). *Second*, within this common framework, the families must trade-off key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. Such trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. Finally, there is no ‘silver bullet’ for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underlying priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions. Enhancing external awareness about trade-offs and clearly communicating the rationale for final decisions, is in some senses more critical than the specific decisions themselves.

# 1 . Introduction

Over 2 billion people use Facebook, Instagram, and the entire family of Facebook, Inc. applications. Facebook has developed a set of policies, processes, and operational activities aimed at balancing access to this global communications platform with safety for those who use it. Over the last several years, the moderation of online content has grappled with a range of complex social and political issues. One of the primary issues under debate has been how Facebook has determined whether specific pieces of content (or accounts) have violated its existing rules, called the “Community Standards.”<sup>3</sup>

In building its policies, Facebook has sought to seek community and expert input in a range of formal and informal ways. A critical attribute of this process was that the decision on whether something violated these standards was ultimately Facebook’s decision. This ran contrary to the goal of empowering those who use Facebook. To address this issue, in November 2018, in a public note by Facebook CEO Mark Zuckerberg, Facebook announced its intention to create a mechanism for external review and input on decisions about what violates Facebook Community Standards. This could be achieved by building an “independent body, whose decisions would be transparent and binding.”<sup>4</sup>

Facebook engaged in a six-month collaborative co-design process which included meeting with a wide range of organizations – from think tanks and researchers to community and advocacy groups – as well as a public engagement process to seek feedback and concrete suggestions on potential designs.<sup>5</sup> The goal of these engagements was to determine how best to empower this entity to render independent judgment on some of Facebook’s most important and challenging content decisions. These engagements provided key insights into how Facebook’s processes might benefit from external input.

Concurrently, we explored different models of oversight and accountability to understand how other decision-making bodies have approached designing and implementing meaningful oversight. The objective of this analysis was to provide an evidence-based foundation to inform key design decisions for Facebook’s Oversight Board and to understand how different attributes may require trade-offs in outcomes or designs. To do this we reviewed existing legal, business, and social science research related to a range of community and institutional mechanisms for decision oversight<sup>6</sup> as well as a range of judicial and quasi-judicial models.<sup>7</sup> We assessed these models on key design and execution elements to gather evidence on how these features related to both institutional performance and external perceptions. The overall goal of this research was to better understand the landscape of oversight bodies across a range of sectors globally and assess how design and execution features of these bodies impacted how well they functioned and their overall legitimacy in providing oversight.

The findings of this research illustrate the range of different ways oversight may be performed and the extent to which key institutional features may reflect trade-offs between key goals. For instance, the desire for process and decision transparency is often viewed as critical for public scrutiny and public assessment that decisions are credible. However, decision-makers must often consider internal details about individual cases, technical considerations and constraints to ensure that their decisions are executable or feasible; such details can often be sensitive, and parties may not wish those details or the decisions based on them to be disclosed to the general public. Thus, intermediate objectives of credible decisions and operational feasibility may have a direct trade-off. Institutions have approached balancing these trade-offs

3 Facebook Community Standards, accessed at <https://www.facebook.com/communitystandards/>

4 Mark Zuckerberg, A Blueprint for Content Governance and Enforcement (Nov. 15, 2018), <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/>.

5 Brent Harris, *Getting Input on an Oversight Board*, Facebook Newsroom (Apr. 1, 2019), <https://newsroom.fb.com/news/2019/04/input-on-an-oversight-board/>.

6 This review included a range of global systems such as the Swedish Parliamentary Ombudsman, the general features of Civilian Review Boards for U.S. policing, the Indian Panchayat systems, Hospital and Press oversight entities, and the Pacific Coast ILWU Labor Grievance Arbitration process as well as corporate systems such as U.S. audit boards and hospital oversight boards.

7 This review included national and international court systems such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body and the Catholic Apostolic Signatura.



through a range of different mechanisms which can help illuminate different design options for the proposed Oversight Board.

This paper proceeds in the next four sections to elucidate key definitions and methods in Section 2, define the classes of oversight ‘families’ we consider in Section 3, summarize key findings and trade-offs in section 4, and then conclude in section 5 with some considerations from the unique attributes of Facebook’s processes and how this research might inform future assessments of both an oversight board and future regulatory approaches.

## 2. Research Approach

Our approach is broadly nested within the rule of law framework which provides a lens through which to evaluate online governance, including consideration of the nature of the processes in place and the extent to which these processes should be limited and by whom these limits should be defined.<sup>8</sup> Broadly, for the governance of content moderation on platforms to be legitimate according to rule of law values, three key elements should be present: (1) decisions should be made according to a set of rules developed in advance through a deliberative process; (2) the governing rules must be known and applied fairly (i.e. in a manner that is consistent and neutral rather than capricious); (3) there should be process safeguards that provide both an explanation of why a particular decision was made and participatory exploration of potentially incorrect or contested decisions.<sup>9</sup> Facebook aims to comport with the first and second standards through its Community Standards which were made public in May 2018.<sup>10</sup> In the past years, Facebook has added transparency to the process (consistent with the first element) by publishing the minutes of the policy forum where these policies are deliberated and revised.<sup>11</sup> It has helped increase awareness of changes through the recent release of a change log which notes the revisions to these policies over time.<sup>12</sup> The application of these rules has been subject to much discussion and in response, Facebook now regularly publishes its Content Standards Enforcement Report to provide additional transparency in how these rules are applied.<sup>13</sup> In the context of element 3, process safeguards, in May 2018 Facebook also established a re-review process, in which users who have content that has been removed can appeal this removal.<sup>14</sup> This process provides a form of appeal for decisions but provided limited insight into Facebook’s own decision making processes. To address that issue, Facebook has been working to assess how it may better communicate decisions to users to comport with procedural fairness.<sup>15</sup>

### 2.1 Comparative Design and Example Selection

While this rule of law framework is useful, the formal judicial framework as a means of oversight is only one example of the type of oversight body which might provide meaningful process safeguards and generate accountability in a deliberative decision-making process. To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary

8 Strictly speaking, the framework articulated here is an analogy to the rule of law, which, on its own terms, only applies to the coercive actions of governments. See Paul Gowder, *The Rule of Law in the Real World* (2016). Nonetheless, the underlying values relating to respect for persons who have important interests at stake in a governance process persist across contexts.

9 Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, Social Media and Society 1.

10 See *supra* note 1.

11 Policy forum minutes are available at <https://newsroom.fb.com/news/2018/11/content-standards-forum-minutes/>

12 Policy revisions and updates noted at <https://www.facebook.com/communitystandards/recentupdates/>

13 Community Standards Enforcement Report available at: <https://transparency.facebook.com/community-standards-enforcement>

14 Monika Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, Facebook Newsroom (Apr. 24, 2018), <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards/>.

15 T.R. Tyler et al., *Social Media Governance: Can companies motivate voluntary rule following behavior among their users*, Facebook Research (Nov. 1, 2018), <https://research.fb.com/wp-content/uploads/2018/10/Social-media-governance-Can-companies-motivate-voluntary-rule-following-behavior-among-their-users.pdf>.

Ombudsman, the general features of Civilian Review Boards for U.S. policing, the Indian Panchayat systems, Corporate Audit Committees, and the Pacific Coast ILWU Labor Grievance Arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura). We categorized these systems and divided them into general “families” of oversight design along a number of key dimensions to determine if these features impact the legitimacy of the overall body. In this section we define the different concepts upon which we assess these oversight bodies. We also present the underlying theory and framework in which the institutional features and execution of core functions relate to these key concepts. This exposition is intended to inform the understanding of the different classes of oversight bodies discussed in section 3.

## 2.2 Dimensions for Assessment of Design and Execution Features

The goal of the Oversight Board was to cede Facebook’s decision-making authority and meaningfully include the perspectives and voices of the diverse set of people who use Facebook (a concept to which we will refer as “legitimacy”).<sup>16</sup> This concept has been subject to an extensive debate but assessing this debate is beyond the scope of this article. Instead, we present the relevant definition used in our own assessment and leave debates on more nuanced interpretations aside. The following terms have been used to frame our analysis:

The term “**legitimacy**” has been used in both a sociological and a moral sense in the academic literature.<sup>17</sup> In a moral sense, as in the discipline of philosophy, the term is used to mean a justifiable power or right to make decisions.<sup>18</sup> For example, a state may legitimately exercise authority (be morally right to issue laws to its citizens) by virtue of its democratic character. In a sociological sense, the term is used to denote the empirical acceptance of an actor or institution by some relevant group.<sup>19</sup> These two versions of legitimacy are distinct, but are arguably related; a number of empirical scholars have identified how both design and practical execution decisions of institutions can drive both their claim to decision making authority and the general acceptance of the execution of any vested powers.<sup>20</sup> Here, we aim to achieve “legitimacy” in both senses.

The notion of oversight is often associated with the ideal independence, such as “judicial independence.” We elaborate the notion of independence in terms of a higher-level goal of “**autonomy**,” and will say that an oversight body is autonomous when its decisions are grounded in relevant factors *and* not impacted by inappropriate influences.<sup>21</sup> Strategies to facilitate autonomy may include removing financial conflicts of interest, establishing norms of neutrality, and even providing incentives for truthful or balanced deliberation. In such a model, it is critical to understand appropriate dependencies as well as threats to such autonomy

16 This notion builds on definitions of legitimacy of political institutions. See, e.g., S.M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 *American Political Science Review* 69 (1959) (belief that “existing political institutions are the most appropriate or proper ones for the society”).

17 See, e.g., Helena De Vylder, *Stensholt v. Norway: Why single judge decisions undermine the Court’s legitimacy*, Strasbourg Observers (May 28, 2014), <https://strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/>; Dr G.S. Rajpurohit & Dr Anand Prakash, *Khap Panchayat in India: Legitimacy, Reality and Reforms*, 2 *International Journal of Allied Practice, Research and Review* 81 (2015); Mark A. Pollack, *The Legitimacy of the Court of Justice of the European Union*, in *Legitimacy and International Courts* (Harlan Cohen & Nienke Grossman eds., 2017).

18 See, e.g., A.J. Simmons, *Justification and Legitimacy*, 109 *Ethics* 739 (1999).

19 See, e.g. David L. Deephouse & Mark Suchman, *Legitimacy in Organizational Institutionalism*, in *The SAGE Handbook of Organizational Institutionalism* 49 (2008) (describing the use of legitimacy in this context).

20 Ludvig Beckman, *Deciding the Demos: Three Conceptions of Democratic Legitimacy*, 22 *Critical Review of International Social and Political Philosophy* 412 (2017).

21 This conception of autonomy is derived in part from Lawrence Lessig’s conception of institutional corruption. In Lessig’s words, the goal is to limit “institutional corruption [which] is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution’s effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public’s trust in that institution or the institution’s inherent trustworthiness.” Lawrence Lessig, *Institutional Corruption Defined*, 41 *The Journal of Law, Medicine & Ethics* 553 (2013).

in terms of improper dependencies. Design features ensure the former while protecting the institution from the latter. For instance, for financial auditors, proper dependence can be accounting rules and financial info, improper influence can be the interests of management, and design strategies such as financial independence and fiduciary requirements may consequently be used to insulate auditors from management. While this conception of autonomy is helpful it is useful to distinguish it from other institutional concerns such as inefficiencies or incompetence.<sup>22</sup> As evidenced below, the autonomy of an institution is largely driven by key design decisions that impact whether intuitions are in practice or perception biased with respect to the body they are charged to oversee.<sup>23</sup>

Ensuring fair and accurate findings is widely considered a key element of oversight and thus an important dependency in developing such a system is ensuring the “**validity**” of any information considered in the decision-making process.<sup>24</sup> A long-debated issue across a range of different social and economic public policy issues is how best to incorporate argument and evidence in an effective and responsible manner. In particular, including evidence must balance a trade-off in evidence collected using relevant best practices for generating accurate decisions (e.g. scientific approach, evidentiary standards etc.) while ensuring the information is provided within the time and specificity constraints of decision-making cycles.<sup>25</sup>

We adopt the term “**salience**” to refer to the Board’s capacity to take into account process and capacity knowledge as well as case-related knowledge. A decision should be practical, in the sense that it can be implemented under existing operational constraints; moreover, operational constraints may be directly relevant to the accuracy of a decision, as an un-implementable ideal decision may in practice be a less desirable outcome than a fully implementable decision that is only partially satisfactory on idealized grounds. While focus on valid evidence is critical, the information presented must also capture facts and issues relevant to the organizational decision maker’s implementation in order to feasibly adopted.<sup>26</sup> In the absence of this information, which is relevant to constraints or considerations in decision making, valid evidence is difficult to apply and findings must often be ignored in favor of pragmatic concerns, undermining the legitimacy of the overall process.<sup>27</sup>

Scholars and activists have traditionally understood “**procedural fairness**” to be a key legitimacy criterion of processes that make decisions in which individuals have important stakes. Broadly speaking, there are two primary categories of procedural fairness.

- The first is fairness within an existing procedure for decision, which is often called “procedural justice.” That term is typically used in philosophy and in law to refer to the rights of persons to a fair process within dispute-resolution or decision-making systems. For example, ‘is a person participating in this system allowed to have a hearing before action is taken against them, or may they be heard only after the fact?’ is a question of procedural justice. In the academic literature, procedural justice is generally understood as a combination of both (a) outcome-related factors, individuals having a

22 M.E. Newhouse, *Institutional Corruption: A Fiduciary Theory*, 23 Cornell Journal of Law and Public Policy (2, 2014).

23 L. Cosgrove et al., *Under the Influence: The Interplay Among Industry, Publishing, and Drug Regulation*, 23 Accountability in Research 257 (2016).

24 David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 The Journal of Legal Studies 371 (1999).

25 Ross C. Brownson et al., *Researchers and Policymakers: Travelers in Parallel Universes*, 30 American Journal of Preventive Medicine 164 (2006).

26 David Cash et al., *Salience, Credibility, Legitimacy and Boundaries: Linking Research, Assessment and Decision Making*, KSG Working Papers Series RWP02-046 SSRN Electronic Journal (2003).

27 See for example efforts to protect biodiversity and lack of salient information in K. Raustiala & D. Victor, *Biodiversity since Rio: The Future of the Convention on Biological Diversity*, 38 Environment 16 (1996).

right to a process that is more likely to lead to a fair and accurate outcome;<sup>28</sup> and (b) participation-related factors, i.e., individuals having a right to a process that respects their autonomy and their capacity to offer and respond to reasons by giving them a fair chance to have a say.<sup>29</sup> Conventional requirements of procedural justice include a neutral decision-maker, a full opportunity for those concerned to be heard by that decision-maker, and a “reasoned judgment” by that decision-maker.<sup>30</sup>

- o The second is fairness in terms of who gets access to a decision-making process and equality of ability to obtain an effective remedy from that process. Typically described as “access to justice,” this criterion is concerned with preventing, for example, socioeconomic, ethnic, educational, or other disparities in the capacity to resolve disagreements, seek decisional oversight, and practically implement remedies offered by a process.<sup>31</sup>

A key aspect of oversight is how its review of the bureaucracy can be itself reviewed and held accountable – namely the “**transparency**” of the findings. A broad set of social science and legal scholarship has focused on transparency as a key tool to ensure accountability and fairness in institutions charged with defining and enforcing rules and standards.<sup>32</sup> Political philosophy and legal theory focus on the role of transparency and open deliberation in having a civilizing effect on political behavior and generating procedural fairness.<sup>33</sup> Theory and evidence suggest that understanding of the reasons behind a decision help establish fairness, ensure consistency of decisions, and raise peoples’ willingness to accept decisions in the face of any remaining disagreements after the deliberations.<sup>34</sup> In fact, an extensive body of research suggests that people are more likely to accept decisions which are arrived at by a procedure that is fair and are more satisfied with authorities and institutions using procedures that are considered to be fair, even when controlling for their preferred outcomes.<sup>35</sup>

Finally, we adopt the term “**executability**” to refer to the organizational considerations in terms of both affordances and constraints to ensure that the decisions of the board are in fact carried out. Executability is to be distinguished from salience, as the latter refers to the capacity of the board to deliver decisions that are compatible with organizational constraints, while the former refers to the capacity of the organization to implement decisions delivered by the board as well as the capacity of the board to provide the appropriate incentives for their implementation.

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- 28 See, e.g., *Matthews v. Eldridge*, 424 U.S. 319 (1976) (establishing three-part balancing test for procedural due process under American constitutional law which incorporates consideration of the utility of additional procedural protections in ensuring correct decisions).
- 29 These have been referred to elsewhere as “sorting effects” and “process effects.” Bruce L. Hay, *Procedural Justice---Ex Ante vs Ex Post*, 44 UCLA Law Review 1803 (1997).
- 30 John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 American University International Law Review 1173 (1998).
- 31 See, generally, Deborah L. Rhode, *Access to Justice* (2004).
- 32 See, e.g., Joseph Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Quarterly Journal of Economics 1441 (2000); C. Lindstedt & D. Naurin, *Transparency is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 International Political Science Review 301 (2010); A. Brunetti & B. Weder, *A Free Press Is Bad News for Corruption*, 8 Journal of Public Economics 1801 (2003).
- 33 Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 Hastings Law Journal 365 (2000); J. Elster, Introduction, in *Deliberative Democracy* (J. Elster ed., 1998).
- 34 A. Gutmann & D.F. Thompson, *Democracy and Disagreement* (1996); J. Bohman & W. Rehg, *Introduction*, in *Deliberative Democracy: Essays on Reason and Politics* (J. Bohman & W. Rehg eds., 1997); Elster, *supra* note 33.
- 35 J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis* (1975); T.R. Tyler et al., *Social Justice in a Diverse Society* (1st ed. 1997); J.L. Napier & T.R. Tyler, *Does Moral Conviction Really Override Concerns About Procedural Justice? A Reexamination of the Value Protection Model*, 21 Social Justice Research 509 (2008); T.R. Tyler, *Social Justice: Outcome and Procedure*, 35 International Journal of Psychology 117 (2000); T.R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Annual Review of Psychology 375 (2006); M.L. Ambrose, *Contemporary Justice Research: A New Look at Familiar Questions*, 89 Organizational Behavior and Human Decision Processes 803 (2002).

We summarize the key terms, relevance, and the relevant parties whose assessment determines the extent to which features meet these criteria in Table 1 below. In particular, note that some elements are driven by public perceptions and assessment while others are driven by the founding institutions' own views and still others are combinations of the two.

Table 1. Definitions of Key Terms

| CRITERIA                   | RELEVANCE                                                                                                                                | WHO ASSESSES         | DEFINITION                                                                                                                                                                                                                                                                                              |
|----------------------------|------------------------------------------------------------------------------------------------------------------------------------------|----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>LEGITIMACY</b>          | Ultimate objective                                                                                                                       | All                  | Both the authority or right to issue decisions and an empirical acceptance of this right.                                                                                                                                                                                                               |
| <b>AUTONOMY</b>            | Ensure decisions are not influenced, or perceived to be influenced by inappropriate things                                               | Public               | Sufficient resources and support to enable appropriate influences and designed to mitigate the risks of improper influences on decision making.                                                                                                                                                         |
| <b>VALIDITY</b>            | Ensure that decisions consider facts and information that are accurate and comport with best practices                                   | Public               | Decisions based on correct and sufficient information that comports with scientific best practices and/or evidentiary standards.                                                                                                                                                                        |
| <b>SALIENCE</b>            | Ensure that decisions consider applicable constraints which can substantively impact decisions when trading off key values or priorities | Founding Institution | Decisions take into account information about operational complexities and constraints including (1) current technical limitations of company systems; (2) scale and scope of application and implications for implementation (3) Resource (human or monetary) constraints that impact decision making. |
| <b>PROCEDURAL FAIRNESS</b> | Ensure that persons have genuine access to a fair decision-making process.                                                               | Public               | Procedures are available on an equal basis to all persons without bias and provide a full and fair opportunity to consider the positions and interests of all who appear before it.                                                                                                                     |
| <b>TRANSPARENCY</b>        | Ensure that outside stakeholders can understand the basis of decisions.                                                                  | Public               | Public disclosure of outcomes and the reasoning behind those outcomes to the extent consistent with protecting private user information and confidential company information.                                                                                                                           |
| <b>EXECUTABILITY</b>       | Ensure that decisions are in fact carried out.                                                                                           | All                  | Internal capacity and incentives to implement decisions made.                                                                                                                                                                                                                                           |

## 2.3 High-level Framework and Analytic Dimensions

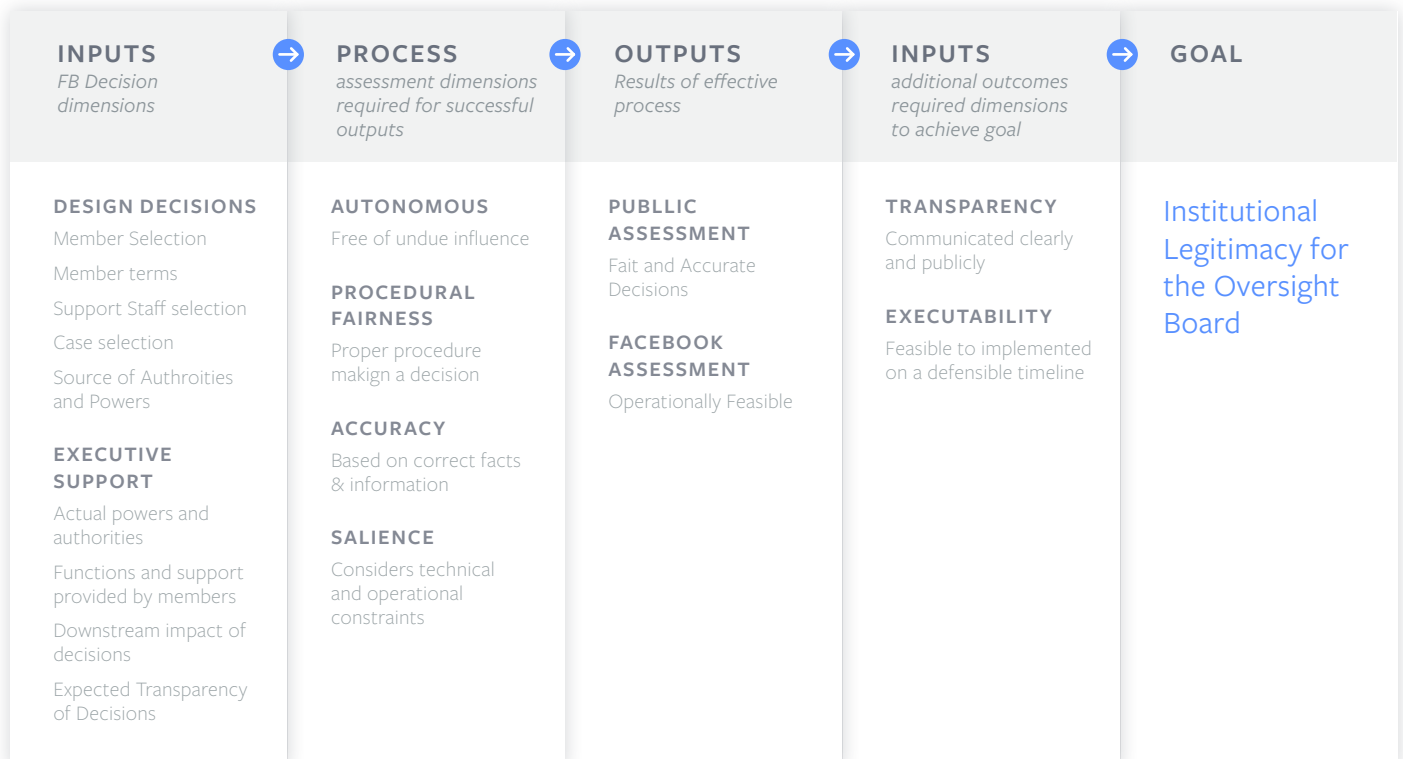
To systematically analyze and compare these families, we identified a common set of dimensions which formed the basis of our analysis and assessment. These are: autonomy, validity, salience, and procedural fairness. There are a range of design features which can be assessed using these criteria, such as the selection of and assignment of roles to institutional or board staff; selecting members to balance stakeholder representation and expertise; and selecting matters for review and assigning those matters to sub-panels or other decision-making bodies within the broader institution. In addition to design decisions, there are execution realities that will also impact the institution's core output, such as managing the board workload and determining the downstream effects of decisions. Taken together, a well-designed and executed institution will yield decisions that produce two outputs: fair and accurate decisions that are operationally feasible.

It is worth noting, though, that even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner. Figure 1 below illustrates how the design and execution decisions, process assessment dimensions, outputs, intermediate outcomes for assessment and ultimate goal map into a unified process.

Figure 1. (See chart below) Conceptual Framework Mapping Design and Execution Process into Desired Goals

## 3. Models of Oversight

To better understand the range of oversight models that exist globally, we reviewed the existing research from a range of legal and academic sources on different classes of oversight models. This review included community and institutional mechanisms for decision oversight (including the Swedish Parliamentary Ombudsman, the general features of Civilian



Review Boards for U.S. policing, Hospital and Press oversight entities, Corporate Audit Committees, the Indian Panchayat systems, and the Pacific Coast ILWU Labor Grievance Arbitration process) as well as a range of judicial and quasi-judicial models such as the U.S. court system, the French Court of Cassation, the European Court of Justice, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the World Trade Organization Appellate Body, and the Catholic Apostolic Signatura.) and others. Broadly speaking, we can identify six major families of adjudicative and oversight bodies: investigative, supervisory, arbitration, community adjudication, national courts and international courts.

### 3.1 The Investigative Institutions Family

In a number of institutional contexts, decision makers are supervised by independent investigators or investigative boards, which do not typically directly exercise authority over their decisions but bring public attention to their decisions and help impose internal and external accountability on them. Salient examples of such institutional investigators include Inspectors General (found in various administrative agencies), the Swedish Ombudsperson, and the Civilian Review Boards that exercise a variety of investigative and oversight functions over allegations of police misconduct in many U.S. cities. Their lack of authority is a key tradeoff relative to other enforcement models, and may permit several compensating advantages, including (a) the capacity to focus on investigations rather than be drawn into management functions, (b) the capacity to include representatives from external stakeholders to whom an organization may not be willing to grant direct authoritative power, and (c) the capacity to receive frank information from within organizations whose members may not feel free to speak freely to hierarchical superiors.<sup>36</sup>

Typically, the processes of these organizations are non-adversarial—while a person may make a complaint to the ombudsperson, they are not entitled to be heard in some kind of proceeding before that entity; rather, the ombudsperson conducts an independent investigation and issues a report which chastises the offending agency for non-compliance, with the idea that it will later be subject to democratic accountability.<sup>37</sup> These models can be applied as a form of review to the extent the ombudsperson or the review board has the authority to investigate and supervise the conduct of adjudication. The Swedish Ombudsman, for example, will often investigate and criticize judicial processes, particularly for lack of procedural fairness; civilian review boards will often investigate and reconsider or criticize the outcomes of internal affairs adjudication against police officers accused of misconduct.<sup>38</sup>

The variations on the Civilian Police Review Board in the United States illustrate the diversity of institutional forms that investigative institutions may take. These review boards have been classified into three broad types:<sup>39</sup>

1. *Investigative* boards are staffed by civilian investigators that conduct independent review of complaints against police officers;
2. *Review* boards do not conduct investigations, but do review the results of staff-conducted investigations, and may hold public hearings and issue recommendations for further work in specific cases; and
3. *Auditing* boards focus less on specific cases and more on broad patterns in cases, making recommendations to reform policies and procedures of the departments they review.

36 On confidentiality and detachment from a management hierarchy as a key feature of the ombuds role, see D. Miller, *Editorial: In Whom Can We Trust?*, 4 *Journal of the International Ombudsman Association* 6 (2011) (“The existence of an office of privilege, unlinked to management, helps to ensure that the smallest voice can be heard without fear of retaliation, where matters can be stated and addressed on a level playing field, where might is not necessarily right and truth — with all its modern-day nuances and subtleties — can stand a chance of affecting outcomes.”).

37 Riksdagens Ombudsmän, A Parliamentary Agency (2014), <https://www.jo.se/en/About-JO/The-Parliamentary-agency/>.

38 *Id.*; Joseph De Angelis et al., *Civilian Oversight of Law Enforcement: A Review of the Strengths and Weaknesses of Various Models* (US Department of Justice, Office of Justice Programs 2016).

39 This typology is drawn from Angelis et al., *supra* note 38.

Further variation within this broad typology includes the extent to which boards can enforce specific policy reforms (bringing such boards closer to the supervisory institutions family),<sup>40</sup> the extent to which board members are paid or volunteer, the entities that appoint the board (and particularly the representation of community organizations and police officials, or lack thereof, in the appointment process), and the degree of training and expertise in board members. In addition, some Civilian Police Review Boards aim to serve a function of mediation and reconciliation, similar to arbitral boards in the typology of this report, as well as to reconciliation institutions in transitional justice and human rights contexts.<sup>41</sup>

Institutions within this family also vary in their degree of organizational independence from the entity being investigated. For example, while key to the identity of a Civilian Complaint Review Board is its status as a *civilian* board, the literature surrounding the Ombudsperson's role has identified a characteristic dual identification deriving from the fact that the Ombudsperson is a member of the investigated organization. The Ombudsperson is said to be an "inside-outsider"---embedded within an organization and its culture, while seeking to represent the outside perspective to the organization.<sup>42</sup>

Hospital Incident Review Boards occupy a similar institutional role. Such boards receive numerous complaints anonymously from staff and from patients; accordingly, analyzing each incident reported to a board in-depth is unfeasible. Therefore, more serious issues will receive root cause or in-depth analysis to enable meaningful changes whereas less serious incidents or complaints can be the subject of a mixture between formal investigations and unstructured discussions. This mixture of formal investigations and unstructured discussions allows for the identification of contributory causes.<sup>43</sup> The experience of the investigators, organizational trust and the severity of the incident are key factors associated with better learning in relation to Hospital Incident Review Boards and how they conduct their reviews.<sup>44</sup>

A central goal of these boards is to learn from adverse incidents in healthcare, which involves making decisions based on incomplete or uncertain data.<sup>45</sup> Safety managers are the first port of call for identifying issues of concern from the range of issues raised through department meetings. These safety managers refer issues of concern to the hospital-wide committees and unit-specific incident review meetings. These meetings are unstructured and free flowing in the lower level where issues of low-impact harm are discussed. High-level meetings are more structured but focused on streamlined succinct reports rather than the investigations themselves.<sup>46</sup>

Press entities also feature such investigative bodies. The demands of a 24-hour news cycle place considerable pressures on press media in relation to the balance between ethical considerations and publication reflections. This often results in trade-offs between journalistic ethical norms and media market demands.<sup>47</sup> Self-regulation within press media centers around the concept of accountability. Bardoel has identified four main types of regulatory mechanisms for accountability

40 Most Civilian Police Review Boards lack formal powers to compel the resolution of specific disciplinary cases. Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 Seton Hall Law Review 1033 (2016).

41 For an example, see Najeeba Syeed-Miller, *Developing Appropriate Dispute Resolution Systems for Law Enforcement and Community Relations: The Pasadena Case Study*, 22 Ohio State Journal on Dispute Resolution 83 (2006).

42 Timothy Hedeem, *Ombuds as Nomads? The Intersections of Dispute System Design and Identity*, 13 University of St. Thomas Law Journal 233 (2017) citing Howard Gadlin & Elizabeth Walsh Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 Negotiation Journal 17, 19 (1997).

43 Janet E. Anderson & Naonori Kodate, *Learning from Patient Safety Incidents in Incident Review Meetings: Organisational Factors and Indicators of Analytic Process Effectiveness*, 80 Safety Science 105, 105 (2015).

44 L. Drupsteen & F.W. Guldenmund, *What is Learning? A Review of the Safety Literature to Define Learning from Incidents, Accidents and Disasters*, 22 Journal of Contingencies and Crisis Management 81 (2014).

45 *Insights from Applying Rigor Metric to Healthcare Incident Investigations*, 52 Proceedings of the Human Factors and Ergonomics Society Annual Meeting 1766 (E. S. Patterson et al. eds., 2008).

46 See Anderson & Kodate, *supra* note 43, at 107.

47 Torbjörn Von Krogh & Lars W. Nord, *Between Public Responsibility and Public Relations: A Case Study of Editors' Attitudes Toward Media Accountability in Sweden*, 3 Communication, Culture & Critique 190 (2010); J.F. McManus, *Media Accountability in the Era of Market-Driven Journalism*, in Media accountability today. ... and tomorrow: Updating the concept in theory and practice (T Von Krogh ed., Charly Hultén trans., 2008); Vinzenz Wyss & Guido Keel, *Media Governance and Media Quality Management: Theoretical Concepts and an Empirical Example from Switzerland*, in Press Freedom and Pluralism in Europe: Concepts & Conditions 115 (Andrea Czepek et al. eds., 2009).



used by European media outlets: 1) market, 2) professional, 3) political, and 4) public.<sup>48</sup> These four spheres of accountability are intertwined within the functions of media outlets but media accountability systems, other than those governed by state regulation, are regulated by moral pressure rather than any particular statute. Media outlet conduct is also subject to various media ombudsperson standards which provide appellate level oversight within the sector.

Media Accountability Systems (MAS) can be categorized into three overarching categories to regulate standards and ethics of media outlet content publication oversight. These mechanisms may serve the public good but also serve to maintain an image of trustworthiness:<sup>49</sup>

- *Internal* mechanisms include personal standards and preferences, organizational culture, and professional standards.
- *External* mechanisms of control may be supervisory committees or different forms of external monitoring.
- *Cooperative* mechanism may be a press council, with representation of media owners, journalists, and the public.

Sweden has one of the oldest and most robust self-regulation mechanisms which consists of a Press Ombudsman for the Public and a Press Council which includes some members of the public.<sup>50</sup> Some of the strengths of the Swedish system are that these oversight bodies are well established and have a high legitimacy. It is cheap and simple for complainants and they protect the interests of the vulnerable.<sup>51</sup> Some of the criticisms of the oversight system is that it can be too slow, sometimes aloof, old fashioned or inflexible. It can also be tied to the belief structure or agenda of the person holding the office of Ombudsman.<sup>52</sup>

### 3.2 The Supervisory Institutions Family

Supervisory institutions such as corporate audit committees focus on providing advice and occasionally oversight on key decisions. This includes a range of structures more common in the private and academic sectors such as corporate boards and institutional or ethical review boards. Like the investigative models, these institutions may review and govern specific decisions but do not have future direct rule-making authorities. Unlike investigative models, these institutions are typically vested with some authority to prevent specific approaches or decisions. Unlike courts, these institutions may not allow outside parties any rights to appear before them and use them to contest organizational decisions; this limitation obviates a number of worries that traditionally attend courts, such as the need to balance confidential information with third-party participatory rights.

Audit committees may be forced to address a large volume of issues and are advised to focus on those issues with the greatest impact, rather than focusing on all issues equally, to allow boards with limited time and resources to use this oversight facility to its maximum potential.<sup>53</sup> Using lower level specialized committees with expertise in particular areas to offload less significant issues allows oversight auditing bodies to focus their resources more efficiently.<sup>54</sup>

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48 J. Bardoel, *Converging Media Governance Arrangements in Europe*, in *European Media Governance: National and Regional Dimensions* (G Terzis ed., 2007).

49 The MAS categories are taken from *An Arsenal of Democracy: Media Accountability Systems* (C. J. Bertrand ed., 2003).

50 Von Krogh & Nord, *supra* note 47.

51 *Id.* at 199.

52 *Id.*

53 KPMG, *Global Boardroom Insights Audit Committee Workload: Keeping an Eye on the Ball* (KPMG 2014) 8 <https://home.kpmg/content/dam/kpmg/my/pdf/External/ac/issue-5-audit-committee-workload-keeping-an-eye-on-the-ball-nov-2014.pdf>.

54 *Id.*

Audit committee composition is regulated by the need to have a charter that is publicly accessible. Its members are regulated to ensure that they are independent from management and possess sufficient financial expertise.<sup>55</sup> The remuneration of these assessors as well as any form of compensation for a material amount of work must be set out prior to the committee undertaking any work to avoid any perception that the board of directors is attempting to influence the committee.<sup>56</sup> Audit committees are required to undertake a self-assessment each year. These assessments are an opportunity to evaluate performance and improve their processes. This evaluation can consist of internal, external or a mix of both assessors who compare the performance of the committee against its charter and comparable committees/peers.<sup>57</sup>

### 3.3 The Arbitration Family

This category captures a family of adjudication methods that focuses less on achieving correct results and more on achieving peace and community legitimacy/adherence. Members of this family may bear little resemblance to a court in any of the conventional senses, and often bear little resemblance to one another, but share this common adherence/legitimacy feature in the context of ongoing relationships where dispute resolution in the interest of relationship preservation is more important than legal formalism or correctness.<sup>58</sup>

One salient sub-family of examples comprises institutional processes such as commercial dispute arbitration or labor grievance. Like companies in an ongoing commercial relationship, union members and employers have a mutual interest in maintaining their financially beneficial relationship, and sometimes craft adjudicative processes to privilege that maintenance. For example, the grievance process in the contract between the Pacific Coast ports and the ILWU (a large and effective multi-port labor union) primarily consists of a series of appeals to broader geographic labor committees (port, area, and regional committees), each of which consists of union and employer representatives and must decide unanimously.<sup>59</sup> This system is clearly crafted to ensure that all disputes that can be solved by consensus between labor and management will be so solved. Only when such consensus is totally impossible is the decision delegated to an external arbitrator, selected by a similar consensus-as-far-as-possible method.<sup>60</sup> The inherent tradeoff in this method of dispute resolution is that organizationally shared goals are prioritized over individual goals; an employee who finds him or herself at odds both with the union and with the employer about the correct resolution of such a labor dispute, for example, is potentially unlikely to find his or her interests taken entirely to heart in the arbitral process.

### 3.4 The Community Adjudication Family

Many communities feature traditional forms of dispute resolution that are more or less independent from (although sometimes incorporated by) official, formal, or state-centered modes of dispute resolution. For example, India has had, at various points in its history and in various regions, a dispute resolution system oriented around local councils of high-

55 Ernst and Young, *Staying on Course: A Guide for Audit Committees* (Ernst and Young 2014) 17 <http://bit.ly/EYStayingOnCourse2014>. The standards described in this section apply to companies listed on the New York Stock Exchange under NYSE Listed Company Manual § 303A.07 as well as Securities and Exchange Commission regulations, 17 C.F.R. § 240.10A-3.

56 Gregory A. Markel & Heather E. Murray, *Internal Investigations Special Committees Resource*, Harvard Law School Forum on Corporate Governance and Financial Regulation (2017), <https://corpgov.law.harvard.edu/2017/07/06/internal-investigations-special-committees-resource/>.

57 Ernst and Young, *supra* note 55, at 18.

58 While we use the term “arbitration” to capture this feature of dispute resolution, it more correctly could be applied to an entire spectrum of alternative dispute resolution methods (including, for example, mediation) oriented around conflict de-escalation and resolution within an ongoing relationship. See generally Ronald J. Fisher & Loreleigh Keashly, *The Potential Complementarity of Mediation and Consultation within a Contingency Model of Third Party Intervention*, 28 *Journal of Peace Research* 29 (1991); Jay Rothman, *Conflict Engagement: A Contingency Model in Theory and Practice*, 21 *Peace and Conflict Studies* 104 (2014).

59 ILWU-PMA, *Pacific Coast Long Shore Contract Document July 1, 2014 – July 1, 2019* (2014) [http://apps.pmanet.org/pubs/LaborAgreements/2014-2019\\_PCLCD\\_web.pdf](http://apps.pmanet.org/pubs/LaborAgreements/2014-2019_PCLCD_web.pdf).

60 *Id.*

status citizens, the *Panchayat*, and the Indian government has conducted various efforts to make use of that system and variations on it to fill gaps in local dispute resolution processes.<sup>61</sup> Similarly, adjudicative practices of indigenous communities in Colombia are protected under the 1991 Constitution of Colombia.<sup>62</sup> This system allows indigenous groups to adjudicate on non-heinous internal crimes which do not involve inter-indigenous group crimes or incidents involving non-indigenous peoples.<sup>63</sup> In some contexts these legal practices are often not based on historical legal principles but are modern adaptations where such groups have not found effective remedies in the dominant legal structures to their specific needs.<sup>64</sup>

Characteristic of such community-based processes is that they attempt to draw decision makers from community elites and apply community values rather than legal system values.<sup>65</sup> A key advantage of such systems is their greater capacity to generate decisions that local persons will agree with (as opposed to centralized decision makers applying centralized rules that may lack local legitimacy); a key disadvantage is that they may undermine efforts to carry out universal or values-based reforms and policies.<sup>66</sup> Indeed, they may violate state law or existing human rights principles in the interests of community reconciliation.<sup>67</sup> Community-based dispute resolution processes may be particularly effective in contexts where formal institutions lack the capacity to effectively enforce their judgments; a prominent example is in supplying land security in Afghanistan.<sup>68</sup>

### 3.5 National Court Systems

This family, can be divided into two sub-families, broadly representing courts characteristic of the civil law and the common law traditions. The former family is exemplified by the French Court of Cassation (with some features also shared by the European Court of Justice “ECJ” and the Catholic Apostolic Signatura), and stands out for a structure that focuses on volume processing and the suspicion of judicial lawmaking via precedent. The French Court of Cassation decides about 30,000 cases per year, and decides them in extremely short written opinions which lack any notion of a dissent or any other way to signify differing opinions among the judges.<sup>69</sup>

In order to cope with the caseload, the French Court of Cassation also has over 100 judges and never sits *en banc*—most cases are disposed of by fairly small panels assigned in a somewhat impenetrable way.<sup>70</sup> Judges tend to come up in a career track within the legal system. Generally courts in or adjacent to this family tend to make extensive use of internal structure, such as Court Presidents, Panel Presidents, Judge-Rapporteurs selected for specific cases, and the like to assign cases to different panels, delegate parts of the workload, prepare preliminary reports and opinions, and make preliminary determinations about admissibility. Cassation also limits itself to reconsideration of legal conclusions from below and does not intervene in the underlying facts found by the courts it supervises. In addition (and consistent with the broader

61 For summaries of the various iterations and variations of the panchayat under modern Indian governance, see, generally, Shishir Bail, *From Nyaya Panchayats to Gram Nyayalayas: The Indian State and Rural Justice*, 11 83 (2015); Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 Hastings Law Journal, 789.

62 Luis Eslava, *Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons*, 22 Revista Derecho del Estado 183 (2009).

63 *Id.*

64 Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 Journal of Latin American Studies 207 (2000). Van Cott, D.E (2000).

65 S. Latha & R. Thilagaraj, *Restorative Justice in India*, 8 Asian Journal of Criminology 309 (2013); James A. Wall et al., *Third-Party Dispute Resolution in India and the United States*, 38 Journal of Applied Social Psychology 3075 (2008); L.P. Thomas, *Dispute Resolution in Rural India: An Overview*, 2 Journal of Legal Studies and Research 96 (2016).

66 For example, scholars and practitioners have criticized community adjudication boards rooted in traditional local institutions in various countries for gender bias as well as for an inability to adapt to heterogenous and pluralistic contexts. See e.g., Tilmann Röder J., *Informal Justice Systems: Challenges and Perspectives, in Innovations in Rule of Law A Compilation of Concise Essays* 58, 59 (Juan Carlos Botero et al. eds., 2012).

67 Van Cott, *supra* note 64, at 214–15.

68 Ilia Murtazashvili & Jennifer Murtazashvili, *Can Community-Based Land Adjudication and Registration Improve Household Land Tenure Security? Evidence from Afghanistan*, 55 Land Use Policy 230 (2016).

69 Mitchel de S.O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 Cornell Law Review 995, 1006 (2005). Lasser, M. de S.O.-l'e (2005). The European Pasteurization of French Law, *Cornell Law Review*, 90: 995-1085, 1006.

70 *Id.* at 1004.

continental idea of an inquisitorial rather than an adversarial process), the public prosecutor is entitled to take an advisory role in adjudication, and also an administrative role, for example, referring decisions of lower courts to Cassation.

The word “cassation,” which is used in a number of European Courts, is often taken to signify a difference between the U.S. model of appellate adjudication as lawmaking and a more administrative style—cassation is primarily about quashing incorrect decisions from the courts below, and, secondarily, making sure the law is applied consistently, rather than precedent setting and legal development.<sup>71</sup> That being said, scholars have observed that the French Cassation Court nonetheless manages to create things that more-or-less look like a weak kind of precedent, perhaps simply because the imperative to generate case-by-case consistency motivates practices like deciding subsequent cases in accord with previous decisions.<sup>72</sup> In that sense, the lack of precedent in Cassation may just mean that even though the court decides cases in a way that is aware of its past, the government need not do so—one cannot say that some decision of the Court of Cassation is law that the executive must follow, in the way one can in the U.S. Scholars and judges from other families have criticized the cassation model for depriving litigants of a genuine opportunity to fully participate in the adjudication of their cases; for example, the French Court of Cassation has even been condemned by the European Court of Human Rights.<sup>73</sup>

The common law family is exemplified by the American federal court system: American appeals are handled in many different ways in the federal and state systems, but two models are of distinct interest in comparative context. First, the U.S. Supreme Court (“SCOTUS”) stands out as a salient example of a totally judge-driven system. SCOTUS has almost-total discretion over its own caseload (unlike the European family), it can hear a fairly small number of important cases; because it is an extremely high-prestige and heavily supported operation, it has a judiciary with substantial capacity. The result is that the Court exercises vast real-world external power as well as largely unconstrained internal power over its own operations—while the Court has a staff, the activities of the permanent staff are mostly limited to internal administration, and those staff members who actually participate in the judicial function by producing things like draft opinions are individual, short-term, assistants to individual justices, hired by those justices (clerks), and hence strongly within the control of those justices.<sup>74</sup>

As such, SCOTUS is largely free from worries raised about the European and International families with respect to the competence of judges, the domination of decisions by staff or by internal bureaucratic procedures, the failure to give full attention to the positions of litigants in the cases it considers, and the like. However, the importance of every single judge, combined with the small number of judges and the vast power that SCOTUS has to set binding precedent and to overturn the decisions of other branches via the power of judicial review, has led to the extreme politicization of the appointments process for justices.<sup>75</sup> The stakes of an individual justice are simply much higher, so partisans have (as recent history in the United States clearly indicates) deployed extreme tactics to secure their preferred justices; this (longstanding) partisan influence on appointment has led, in turn, to widespread worries (equally longstanding) about the ability of the court to make its own decisions free from partisan bias.<sup>76</sup>

71 Raymond Leo Cardinal Burke, *The Relation between the Apostolic Signatura and the Particular Churches*, 74 *The Jurist: Studies in Church Law and Ministry* 31 (2014); Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated...*, 50 *The American Journal of Comparative Law* 201 (2002).

72 M. Troper & C. Grzegorzczuk, *Precedent in France*, in *Introduction to Interpreting Precedents: A Comparative Study* (D. N. MacCormick et al. eds., 1st ed. 1997); Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example* (Stanford Law School China Guiding Cases Project), Feb. 29, 2016.

73 Lasser, *supra* note 69.

74 David R. Stras, *Book Review Essay: The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 *Texas Law Review* 947 (2007).

75 See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *Law and Contemporary Problems* 41 (2002); Martin M. Shapiro, *Supreme Court and Government Planning: Judicial Review and Policy Formation*, 35 *George Washington Law Review* 329 (1966).

76 B.L. Bartels & C.D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 *Public Opinion Quarterly* 105 (2012); James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 *American Journal of Political Science* 139 (2009); Miles T. Armaly, *Politicized Nominations and Public Attitudes toward the Supreme Court in the Polarization Era*, 39 *Justice System Journal* 193 (2018); Eric Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 *Pepperdine Law Review* 547 (2017).

Almost diametrically opposed to the SCOTUS model is the system of administrative appeals in federal executive agencies. There, judges are effectively career civil servants who are selected for their capacity to most effectively apply the internal rules of the agency in which they operate—for example, their capacity to adjudicate the question of who is disabled for the purpose of receiving social security disability benefits.<sup>77</sup> Such administrative judges are widely viewed as competent, within their domain, but quite unlikely to be independent—simply as particularly good rule-appliers without much capacity to, for example, import external values into the application of the rules.<sup>78</sup> They sometimes have the capacity to generate their own precedent, but, when they do so, it is as a purely internal process—i.e., internal interpretations of the agency’s own rules, binding on subordinates within the agency, but subject to change by agency executives at any time.

### 3.6 The International (Primarily Human Rights) Court Family

This family, exemplified by the Inter-American Commission and Court on Human Rights, the European Court of Human Rights, the European Court of Justice, and similar courts, tends to bear some resemblance to the European family, particularly with respect to the substantial role played by staff and by internal organization in managing caseload. However, it has distinctive features deriving from the international context. In particular, the independent stakeholders of these courts, in the form of sovereign states which participate in their authorizing treaties, tend to exercise a quite strong role in appointing judges. In some cases, the states formally appoint their own judges; in others, they’re merely nominated by states and some central body formally carries out the appointment, but where the literature contains suggestions that those appointments are *de facto* state appointments.<sup>79</sup>

This stakeholder nomination process may promote both buy-in by these states as well as fair consideration of their distinctive interests. Some courts have made elaborate efforts to manage such buy-in via regulating the representation of states in matters with which they are concerned.<sup>80</sup> However, the price for these features has been lingering concerns about the capacity of those courts to generate professionalized and unbiased decisions, and ongoing reform efforts—for example, the European Court of Human Rights nomination process since 2010 has been enhanced by an advisory panel of former ECtHR judges and judges from other legal systems who advise the formal nominating body and has been credited with leading to a greater rate of rejection of unqualified candidates put forth by national governments.<sup>81</sup>

Some of these concerns arise from differing levels of support for the courts across the states that participate in them; states with less support for the courts have been accused of appointing less-qualified judges to them or using them as patronage nominations.<sup>82</sup> This is exacerbated by the fact that these courts tend to have very strong bureaucratic staff as well as assistant or internally subordinate judicial bodies that handle the brunt of the workload in terms of preliminary determinations—which may in part be an imperative of the sheer number of meritless or apparently meritless claims

77 Michael Asimow, *Five Models of Administrative Adjudication*, 63 American Journal of Comparative Law 3 (2015).

78 James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 Wake Forest Law Review 1191, 1199 (2006).

79 Basak Cali & Stewart Cunningham, *Judicial Self-Government and the Sui Generis Case of the European Court of Human Rights*, 19 German Law Journal 1977 (2018).

80 For example, the Inter-American Court of Human Rights prohibits judges from concerned states from sitting on cases brought by private citizens, but guarantees their representation on cases brought by other states (Rules of Procedure of the Inter-American Court of Human Rights Art. 19-20, referring to American Convention on Human Rights Article 44, concerning cases brought by private persons, and Article 45, brought by states). The European Court of Human Rights allows a judge elected in respect of a state concerned in a case may sit *ex officio* in seven-judge chambers and grand chambers (European Convention on Human Rights Article 26), and permits three-judge committees appointed to consider cases brought by individuals to invite a judge elected in respect of that country to join the panel (European Convention Article 28, 34), although it forbids such judges from sitting in grand chambers on cases referred to them from smaller ordinary chambers (Rules of Court 24(5)(c), referring to Convention article 43, on referral to grand chamber from ordinary chamber).

81 See Cali & Cunningham, *supra* note 79, at 1986.

82 On the disadvantages of state-centered nomination processes, see J. Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (2003) <http://www.corteidh.or.cr/tablas/32795.pdf>; Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harvard International Law Journal 271 (2003).

that are filed in human rights courts.<sup>83</sup> In the Inter-American System in particular, this has led to a situation where (according to some scholars) the Commission is almost totally dominated by its staff, as part-time, often not-high-status Commissioners lack the capacity to do more than rubber-stamp bureaucratic determinations.<sup>84</sup>

As a particularly prolific international court, the European Court of Human Rights (“ECHR”) has been the object of a substantial literature with respect to fundamental criteria of oversight legitimacy, such as transparency and independence. On transparency: while elements of the selection of judges to the ECHR, such as CVs and judicial pay, are available and published by the Council of Europe and the European Court of Human Rights (ECtHR), as are separate concurring and dissenting opinions where written, information such as advice or recommendations from the Jurisconsult are not made available currently.

Judges on the ECtHR benefit from several institutional supports to preserve their independence once nominated. They serve nine-year, non-renewable, terms (thus rendering them immune to re-nomination pressures, although potentially not pressures from national governments relating to access to subsequent appointments to other offices), and may only be removed with the concurrence of a 2/3 majority of the other judges on the court.<sup>85</sup> The Council on Europe has also urged states to further protect judicial independence by guaranteeing them legal immunities and further positions on the conclusion of their terms in order to relieve them of other vulnerabilities that may allow pressure to be exerted over their decisions.<sup>86</sup> Judges are prohibited from engaging in activities that are a conflict of interest while serving as a judge and in the immediate period after leaving office.<sup>87</sup> This includes representing third-parties in court proceedings if the case had been entered during the period of service as a judge of the court and for a period of two years after the dates in which they ceased to hold office as a judge of the court.

The ECtHR also makes heavy use of precedent in order to preserve consistency in its high-volume caseload and avoid duplicative case resolution. There is evidence in the empirical literature that the ECtHR uses precedent as a legitimizing tool to substitute for its lack of coercive power in inducing domestic courts to apply its rulings.<sup>88</sup> Voeten suggests that in fact the ECtHR functions just as domestic courts do in terms of using precedent, i.e., that they rely on ideology rather than reflecting interests of national governments or cultural differences.<sup>89</sup>

There are also international bodies, particularly in the commercial context, that straddle the boundaries between judicial and arbitral models. A key example is the World Trade Organization’s (WTO) Appellate Body. While the Appellate Body operates like a court in many respects, including, for example, the creation of precedent which it follows in subsequent cases, the hearing of *amicus curiae* submissions by interested third parties, and a formalized adjudicative procedure, it is embedded in an institutional context which assumes that it is designed to support consensus on rules among World Trade Organization (“WTO”) members. Thus, WTO member states must approve new Appellate Body members by consensus; the member states (through a representative organization, the Dispute Settlement Body) may overturn decisions of that body, also by consensus; and much of the adjudicative process is held to be confidential under WTO rules.

83 For example, the Inter-American Court only takes up cases that have already been decided by the Inter-American Commission and then brought by the Commission to the Court to bring recalcitrant states in line (see IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, art. 31(1); American Convention on Human Rights, art. 46(1)(a)); the ECJ has an extremely strong internal Advocate-General system where the advocates act essentially like junior judges, issuing public opinions before the judges actually get to them, and which the judges very frequently rubber-stamp. See Carlos Arrebola et al., *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, 5 Cambridge International Law Journal 82 (2016); Noreen Burrows, *The Place of the Advocate General in the Procedure of the European Community Courts*, in *The Advocate General and EC Law* (Noreen Burrows & Rosa Greaves eds., 2007).

84 Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 Notre Dame Journal of International & Comparative Law 1.

85 European Convention on Human Rights, Article 23. See Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 Wm. & Mary Bill Rts. J. 7, 33–36 (2001) (arguing that non-renewable terms promote judicial independence).

86 Cali & Cunningham, *supra* note 79, at 1991. 1

87 Rule 4 of the ECtHR Court Rules

88 Yonatan Lupu & Erik Voeten, *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, presented at Political Networks Conference 37, 5 (Paper 12 2010) [http://opensiuc.lib.siu.edu/pnconfs\\_2010/12](http://opensiuc.lib.siu.edu/pnconfs_2010/12).

89 Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 American Political Science Review 417 (2008).

This dual character has led to tensions and the possible impending organizational failure of the World Trade Organization Appellate Body. The United States has exercised the power given to every state member by the consensus appointment process to refuse the appointment of new members of the Appellate Body; as of this writing, the Appellate Body has a bare minimum of members, and is projected to be unable to obtain a quorum (and hence to operate) as soon as the next current member's term expires.<sup>90</sup> The complaints of the United States focus on the Appellate Body's court-like conduct, particularly the creation of precedent.<sup>91</sup>

Table 2. Summary of Families including Examples and Key Trade-offs

|                                 | INVESTIGATIVE                                                                                           | SUPERVISORY                                                                                                    | ARBITRATION                                                                                                                                                 |                                                                                               | ADMINISTRATIVE                                                                                                    | NATIONAL COURTS                                                                                                                                           |                                                                                                                                                         | INTERNATIONAL COURTS                                                                             |
|---------------------------------|---------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|
|                                 |                                                                                                         |                                                                                                                | <i>Institution</i>                                                                                                                                          | <i>Community-Based</i>                                                                        |                                                                                                                   | <i>European</i>                                                                                                                                           | <i>U.S. Appellate/<br/>U.S. Supreme Court</i>                                                                                                           |                                                                                                  |
| <b>Core Function</b>            | Investigate specific cases or incidents                                                                 | Provide advice and occasionally oversight on decisions.                                                        | Resolve disputes from within an ongoing valuable relationship in the interests of preserving that relationship and generating consensus                     |                                                                                               | Resolve specialized issues regarding home institution                                                             | Address disputes and render rulings on individuals cases based on formal laws and norms                                                                   |                                                                                                                                                         | Adjudicate transnational disputes based on an agreed upon set of international laws or norms.    |
| <b>Sectors using this model</b> | Public, Private, Corporate                                                                              | Private, Academic                                                                                              | Public, Private                                                                                                                                             | Community (non-governmental, sometimes integrated into government)                            | Public                                                                                                            | Public                                                                                                                                                    | Public                                                                                                                                                  | Public, Private                                                                                  |
| <b>Examples</b>                 | Inspectors general, hospital review boards, financial audits, civilian police review boards             | Corporate Boards, Institutional review boards (for academic research)                                          | Labor dispute resolutions, commercial arbitration                                                                                                           | Panchayat, Shura                                                                              | The U.S. Social Security Appeals Council                                                                          | The French Court of Cassation                                                                                                                             | U.S. Supreme Court                                                                                                                                      | International Human Rights Courts, WTO Appellate Body, International Criminal Court              |
| <b>Tradeoffs</b>                | Sacrifice ability to force execution to ensure organizational focus, representative capacity, and trust | Sacrifice third-party access and participatory rights to achieve broad operational insight within organization | Sacrifice transparency and downstream rulemaking capacity to achieve swift and efficient resolution, relationship maintenance, confidentiality preservation | Sacrifice neutrality and broader system policies for likelihood of compliance and civic peace | Sacrifice independence to achieve control of board by organization and policy conformity plus technical expertise | Sacrifice transparency and principled articulation of decisions and development of rules for efficiency at high volume and restraint of judicial activism | Sacrifice organizational control, create risk of politicization, to achieve procedural fairness, outcome quality, independence, conformity to principle | Sacrifice autonomy and (sometimes) decisional quality to achieve powerful stakeholder acceptance |

90 Tom Miles, *U.S. blocks WTO judge reappointment as dispute settlement crisis looms*, Reuters World News (Aug. 27, 2018), <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1L-C19O>.

91 Tetyana Payosova et al., *Policy Brief 18-5: The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures* (Peterson Institute for International Economics 2018) <https://piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>.



## 4. Analytic Findings and Trade-offs

Our review of the existing models, as described above, plus the overall literature on the functioning of oversight bodies, are broadly aimed at discovering design principles applicable to providing meaningful oversight on a deliberative decision-making process in a way that is accepted both institutionally and more broadly in the general public. To that end, despite variation in design and execution, the families can be assessed and compared a common set of dimensions: autonomy, validity, salience, and procedural fairness. When effectively managed, the design and execution features will yield fair and accurate decisions that are operationally feasible. It is worth noting, though, that the degree to which these processes seek one of these outcomes over the other will vary based on the core function of the institution. Indeed, a systematic comparison of these families and associated institutions indicates that there is no ‘perfect system’ – all the systems involve trade-offs and require prioritization based on overall goals. However, even well-designed systems are unlikely to be viewed as legitimate absent an additional set of outcomes which help translate the outputs into a broad sense of legitimacy. For a legitimate institution, the outputs must be transparently communicated and executed in a timely manner.

The different design features along with the execution in practice reveal a number of recurrent considerations in the functioning of oversight boards. At the highest level of abstraction, those considerations include:

- Selecting and assigning roles to board staff, with the key challenge being ensuring that board decisions genuinely come from the board and are not unduly influenced by staff;
- Managing the workload of the board, with the key challenge being that higher workloads potentially reduce the capacity of board members to make consistent and fully transparent decisions;
- Selecting board members, with the key challenge being balancing stakeholder representation, expertise, and autonomy;
- Selecting matters for the board to decide and assigning those matters to sub-panels or other decision-making bodies within the board, with the key challenges being making decisions about the functional role of the board within the overall problem-solving process and balancing authority within the court to ensure fairness and consistency;
- Determining the extent to which the board will communicate the details of its decision-making process and the inputs to that process to the public, including evidence, hearings, votes, and any disagreement among board members, with the key challenge being the balance between the values of transparency and privacy as well as security;
- Determining the downstream effects of decisions in terms of their capacity to set precedent for future decisions and provide feedback to policy-makers; and
- Setting powers and procedures for the supply of information to the board to ensure fully informed and high-quality decisions.

As will be apparent from the below, these considerations overlap somewhat---for example, the challenge of preserving board autonomy with respect to staff arises with particular urgency in boards with a high workload which require a broader scope of delegated authority to staff; that decision in turn implicates foundational questions about the extent to which the board is meant to serve as a day-by-day check on organizational decisions (and hence consider a large number of disputes) as opposed to a broader policy-shaping body (which considers only a small number of significant disputes).

The individual challenges described below should be understood in the context of the key legitimacy criteria described in the introduction to this report.

*Autonomy.* The most developed literature on this criterion tends to be organized around the related idea of “judicial



independence.” Erik Voeten summarizes a number of standard criteria for independence in the context of international courts by identifying key vectors of influence on judges or their decisions to which an institutional designer seeking to preserve independence should attend, with items most relevant for the present purpose including “opportunities to affect the selection and tenure of judges,” “control over the docket of [international courts],” and “control over material and human resources” (i.e., staff and funding).<sup>92</sup> In the present context, these criteria suggest particular attention to the relationship between board members and staff, the selection process and terms of membership for board members, and the criteria for case selection.

*Validity.* As described in the introduction, validity is primarily an input criterion focusing on the capacity of the board to make sound decisions by receiving accurate and complete information and acting on it appropriately. Accordingly, design considerations relating to member and staff expertise and workload as well as evidence and knowledge-acquisition processes are most relevant.

*Salience and Executability.* Primary design considerations to promote salience and executability relate to the relationship between the wider organization and the board, including the role of staff and their relationship to the broader organization as well as the board, and the powers with which the board is vested, particularly with respect to its capacity to generate decisions with an impact beyond the particular case under consideration.

*Procedural fairness.* This legitimacy criterion will be achieved to the extent the internal process of the board adequately provides persons who appear before it with a fair degree of voice, thus moderating a pure truth-seeking information gathering process with one that also takes into account participatory interests of persons with a relevant stake, as well as to the extent the case selection process is unbiased and fairly provides the opportunity to review a diverse and representative group of user and public interests. It will also depend on the neutrality of board members, which in turn depends on the quality of their selection process as well as ethical rules that may be imposed on their operations.

*Transparency.* In part, transparency is a function of the external constraints on a board, such as its workload and the extent to which the decisions it must make involve private or confidential information. Managing those external constraints will be the key design consideration to promote appropriate transparency.

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92 Erik Voeten, *International Judicial Independence*, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 421, 424 (Dunoff & Mark A Pollack eds., 2012). Voeten hastens to note, however, that these formal institutional features are only weakly correlated to expert perceptions of bias. See also Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 *Annual Review of Political Science* 345 (2009).

Table 3. (See chart below) Design Considerations and Legitimacy Criteria

#### 4.1 Balancing Staff Assistance and Board Authority

A naïve description of the personnel structure of oversight boards would rely on a distinction between “board members,” understood as the personnel who, individually or collectively, render authoritative decisions or formally speak for the board, such as the voting members of an audit committee, judges on a court, or arbitrators; and “staff,” consisting of all other personnel who occupy a supporting role but do not speak for the board, such as clerks, assistants, human resources and accounting personnel. While that picture of board staffing has some validity in the abstract, reality is substantially more complicated; for example, many board models feature staff roles who are not formally members of the decision-making group but who exercise substantial formal or informal authority over the disposition of disputes. More generally, the relationship between board members and staff varies widely among the cases examined above. At the highest level of generality, there is observed variation in the following characteristics of staff:

- The scope of responsibility assigned to staff. In some models, staff carry out administrative functions, such as receiving paperwork and budgeting. In some, staff carry out initial dispute screening (e.g., for admissibility), investigation, and other ancillary substantive functions. In the highest-responsibility-staff models, staff generate preliminary resolutions for disputes, which may be adopted wholesale by the board.

| CRITERIA            | DESIGN CONSIDERATIONS                                                                                                                                                                                                                                                                                                                                                                                       |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| AUTONOMY            | Manage relationship between board and organization as well as staff to prevent undue influence.<br>Design neutral and representative appointments process.                                                                                                                                                                                                                                                  |
| VALIDITY            | Design appointments process that selects for expertise. Build effective process for board to seek information from organization and those who appear before it.                                                                                                                                                                                                                                             |
| SALIENCE            | Manage communication process between board and implementing staff as well as overall organization, providing effective communication about feasibility of decisions in the decision-making process.                                                                                                                                                                                                         |
| PROCEDURAL FAIRNESS | Provide a fair process for selecting cases for board review, one which does not systematically exclude any group of persons and which allows persons a reasonable opportunity to offer feedback and critique of underlying decisions consistent with operational efficiency and workload management.<br>Design a selection process that promotes board member neutrality and ethical rules that enforce it. |
| TRANSPARENCY        | Manage board workload to prevent over-delegation to staff and hasty/thinly articulated decisions.<br>Devise balance between protection of private information and communication of results and reasoning to persons seeking review as well as public at large.                                                                                                                                              |
| EXECUTABILITY       | Design effective process for board to interact with overall organization, and established process for implementing decisions. Make conscious decision about the extent to which board has input on broader processes and policies through precedential or persuasive effect on decisions, and how that input will be taken into account on an organizational level.                                         |

- The structure of management authority over staff. In some models, board staff report directly to board members, or to a board president/chief judge; in others they report to a bureaucratic hierarchy in the broader organization. In others, administrative authority and functional authority are distinct.
- The selection process and criteria for staff.

In several cases, there are distinct categories of staff, such as in the U.S. Supreme Court, which contains both administrative staff and personal judicial law clerks with very different roles and selection processes.

The primary challenge faced by existing boards with respect to staff is a tension between staff assistance and board control. A strong staff can provide substantial assistance to board members with tasks such as filtering cases, preparing drafts of written output, and making outcome recommendations. But a too-strong staff can exercise authority that ought to be carried out by the board. In this context, three examples from the cases considered above are particularly salient:

- The Inter-American Commission on Human Rights lacks, on the arguments of some scholars, effective authority partly in virtue of the fact that staff take on a quite large role in case selection and presentation.<sup>93</sup>
- In the United States Courts of Appeals, judges have substantial personal control over their personally-hired staff, however, their workload is sufficiently high that they often delegate substantial authority to staff (law clerks) to dispose of a large volume of minor cases.<sup>94</sup> In contrast to the Inter-American System, the objection raised to the Court of Appeals delegation process is not that the judges lack effective authority (for they do exercise authority over their clerks); rather, it is that the public does not have the benefit of their qualifications in minor cases---decisions delegated to junior members of the profession are less likely to be correct.
- In the European Court of Justice, the judges are assisted by Advocates-General, who write preliminary opinions in important cases. While the Advocates-General are highly qualified and of high status within the profession (unlike U.S. judicial clerks), commentators have worried about the potential for undue influence from Advocate-General opinions and the possible introduction of political bias.<sup>95</sup>

Several other variables are relevant to the problem of staff assistance vs control, and the problem may be better posed as a balance between the strength of the board members/judges and the strength of staff---to the extent that board members are stronger (higher status, more independent-minded, less time-burdened, have greater access to independent sources of information, more direct rather than mediated access to disputants) they will be more able to render autonomous decisions even in the face of a strong staff. Sub-questions include:

## Who are the staff?

In some boards, staff are personnel chosen by the underlying organization. For example, the staff of the European Court of Human Rights are hired by the Council of Europe.<sup>96</sup> In others, such as clerks in the U.S. Courts, staff are chosen by

93 According to Shelton, *supra* note 84, at 10, “the ‘hidden judiciary’ has the files, prepares the memos, presents the draft decisions, and the [Commission] generally spends no more than an hour discussing the matter before largely approving the secretariat draft,” and also notes that “up to ninety percent of all petitions sent to the [Commission] are summarily dismissed” by staff before being seen by Commissioners. Other reasons for the Commission’s lack of power on Shelton’s account include that board members are part-time and sometimes not selected in a fashion designed to maximize their strength and credibility.

94 Penelope J. Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish US Law*, 39 Arizona State Law Journal 1 (2007). In the United States, judicial law clerks typically serve for one or two years immediately after completing their law degree.

95 Jens Frankenreiter, *Are Advocates General Political? Policy Preferences of EU Member State Governments and the Voting Behavior of Members of the European Court of Justice*, 14 Review of Law & Economics (2018); Arrebola et al., *supra* note 83.

96 Rules 8, 15, 16, 18A and 18B of ECtHR Rules of Court 2018.

board members directly.<sup>97</sup> Finally, in still others, staff (or at least senior staff) are chosen by a nomination process parallel to those of board members (as with the Advocates-General in the European Court of Justice).<sup>98</sup> It may be expected that the interests and views of the hiring entity may influence the choices made by staff. In some contexts, staff have been members of the entity being overseen, while board members may be external, leading to skepticism about the extent to which a board is truly external to the organization.<sup>99</sup>

## What information is received by staff versus board members?

In some boards, staff receive information which they distill for the board. For example, in the Inter-American Commission, Commissioners typically do not directly see petitions, but rather see summaries provided by staff.<sup>100</sup> From descriptions of the “cert pool” process in the literature, it appears that United States Supreme Court Justices may typically not see petitions which the court declines to hear.<sup>101</sup>

## What are the concrete roles of staff?

Functions observed in the cases described above include:

- Screen cases for admissibility (most courts).
- Assign cases to panels, sometimes in conjunction with screening.<sup>102</sup>
- Offer advice (privately or publicly) as independent an argument for board to consider in appropriate cases (French Court of Cassation, European Court of Human Rights, European Court of Justice).
- Summarize facts and/or arguments of parties, present to board instead of disputants (Inter-American Commission).
- Prepare preliminary opinions (privately or publicly) as drafts for board to adopt (European Court of Justice Advocate-General, U.S. Courts).
- Conduct investigations (Corporate audit, Ombuds, Civilian Complaint Review Board).

In a given system, some of these functions may be seen as “core” board capacities that are necessary for genuinely independent decisions, and hence must be carried out by or under the close supervision of the board, while others

97 Chap. 10 Sec. 7 of The Judiciary Act of 1789.

98 Art. 253 & 255 Treaty on the Functioning of the European Union (TFEU).

99 Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 Marq. L. Rev. 505, 507–8 (1994) (recounting cases of police civilian review boards where board members were external to department but staff support, including investigation, were conducted within the department).

100 Shelton, *supra* note 84, at 14. This consideration is particularly relevant to Facebook in view of the possibility that matters for consideration by the board could include sensitive user information.

101 The Court reviews the overwhelming majority of its cases at discretion: litigants file petitions for writs of certiorari, which the Court may accept or reject. The standard procedure for considering such petitions involves the delegation to a “cert pool” of clerks who write memoranda recommending acceptance or rejection, seemingly to shield the Justices from having to review the entire petition themselves. See, generally, Stras, *supra* note 74; Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence Over the Supreme Court’s Agenda*, 18 Constitutional Commentary 105 (2001).

102 For example, the registry of the European Court of Human Rights has a “Filtering Section” to direct cases to a single-judge expedited screening process or a panel of judges. See Open Society Justice Initiative, Protocol 14: How it Works (Feb. 2012), <https://www.justiceinitiative.org/uploads/4d7dcfc0-ff44-45bb-951f-5047b529148d/chr2-protocol14-20120227.pdf>. This process has been criticized on the grounds that when the registry allocates cases to single judges to consider for dismissals on grounds of admissibility, it does so with minimal information about the case, and that those judges typically simply “rubber-stamp” registry recommendations. Janneke H. Gerards & Lize R. Glas, *Access to Justice in the European Convention on Human Rights System*, 35 Netherlands Quarterly of Human Rights 11 (2017).

may be seen as “administrative” that can be carried out by staff with minimal supervision.

In order to have a clearer view of the tradeoffs involved, we may identify three core models of staff assistance.<sup>103</sup>

### *Staff assistance model - Trusted Personal Assistant*

In some organizations, there are highly responsible staff roles that lie outside the administrative organizational structure and are characterized by close affiliation with individual board members. The judicial clerks of the U.S. Federal courts are an example of this model. Such clerks are selected and supervised by individual judges, and typically report exclusively to their judges; they may exercise a very high degree of responsibility (such as preparing draft orders and advising judges on outcomes) but do so entirely at the discretion of their employing judge.<sup>104</sup>

### *Staff assistance model - Professional Secretariat*

Some organizations feature their own administrative structure, often composed of experienced professionals with potentially long tenure. In some of these bodies, the head of the staff organizational structure is a board member, such as a Court President; in others, there is a head staff member appointed by the same authorities as those who appoint the board members.

A key example is the Registry of the European Court of Human Rights. The Registry consists of 640 staff members under the authority of a Registrar and a Deputy Registrar. Staff members are chosen by a competitive, civil-service style process organized by the Council of Europe (the international organization under whose auspices the European Court of Human Rights “ECHR” operates), which seems to favor 4-year contracts for junior lawyers.<sup>105</sup> The Registry and Deputy Registrar are selected by members of the Court and are under the supervision of the President of the Court.

The Registry carries out both bureaucratic functions (information technology management, mail, filing and archiving) and legal functions. In the latter category, the Registry primarily seems to offer an advisory role to the judges. There is some uncertainty as to the extent to which lawyers in the Registry exercise power over decisions of the court through this advice-giving function. It has been suggested, however, that there may be substantial informal influence on outcomes by senior members of the Registry, particularly since the terms of judges are limited, such that senior Registry members hold the institutional memory of the court.<sup>106</sup>

A similar example is the administrative structure of the European Court of Justice “ECJ”, which is supervised by members of the court (and its junior court, the General Court) in an administrative committee, chaired by the President of the Court and comprised of other judges, which manages employment, budgeting, and other staffing issues.<sup>107</sup> As the ECJ and ECHR examples indicate, where administrative bodies exist within courts, this may increase the *de facto* authority of those members of the board, whether a Board President or an administrative council or committee, who exercises

<sup>103</sup> In addition, some models of oversight may rely on minimal to no staff support. For example, arbitral models where boards are potentially constructed in an ad hoc fashion by parties to an ongoing relationship may rely, for staff-like functions, primarily on resources supplied by the parties themselves.

<sup>104</sup> For a general description of the functions they carry out, see Todd C. Peppers et al., *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in “Appellate Triage,”* 98 Marquette Law Review 313 (2014).

<sup>105</sup> Council on Europe, *Assistant Lawyers Scheme*, [https://www.echr.coe.int/Documents/Scheme\\_assistant\\_lawyers\\_ENG.pdf](https://www.echr.coe.int/Documents/Scheme_assistant_lawyers_ENG.pdf)

<sup>106</sup> Cali & Cunningham, *supra* note 79, at 1992. See also Kanstantsin Dzehtsiarou, *Appointment of the Court’s Registrar: Towards More Transparency*, Strasbourg Observers (Apr. 22, 2015), <https://strasbourgobservers.com/2015/04/22/appointment-of-the-courts-registrar-towards-more-transparency/>.

<sup>107</sup> Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, 19 German Law Journal 2007 (2018).

primary supervisory authority over that body.<sup>108</sup>

Another key example of this organizational structure is the corporate audit function in the United States, which is often structured as an auditing and investigative staff unit within the normal organization chart (and hence reporting administratively to management), but which is ultimately functionally answerable to the Board of Directors and its independent audit committee.<sup>109</sup> Under the Sarbanes-Oxley Act and regulations enacted thereunder, audit committees in American corporations must be financially independent of the company;<sup>110</sup> the functional reporting arrangement of the internal audit function can be seen as providing support for that independence.

### *Staff assistance model - Junior Board Member*

Some organizations feature a layer of staff that occupy a mixed role, exercising powers similar to those of board members but at a junior level. This structure is particularly characteristic of the European court models. The European Court of Justice, for example, includes Advocates-General who are appointed by the same process as are judges, and who issue preliminary decisions which are generally seen as highly influential on ultimate case outcomes. Similarly, the French Cassation Court grants the Public Prosecutor special privileges, including the power to refer cases to the court for its decision—although that example may not quite fall into that model, as the Public Prosecutor could be seen less as a member of the court and more as a *sui generis* official with a vast array of other powers in the French judicial system.<sup>111</sup>

The European Court of Human Rights also has a role that resembles this junior board member. The Jurisconsult is a legal specialist (and a member of the Registry) employed by the court to ensure that the decisions of the various panels are consistent. According to a former Jurisconsult who served for seven years, the Jurisconsult reviews all drafts of rulings and “warns against discrepancies or omissions of jurisprudence, reports of similar cases being at a more advanced stage, suggests waiting the judgment of the Grand Chamber in a case pending before it and that asks a similar question, highlights imperfections or deficiencies of a motivation, suggests solutions, etc.”<sup>112</sup>

Rather than understanding these models as alternative forms of staff organization, it may be helpful to understand them as distinctive staff roles, which may coexist within the same organization. For example, the Dutch Hoge Raad has a research staff, like a secretariat or a registry, a Public Prosecutor and Advocate General office which offers opinions in

108 In many judicial systems in particular, Court Presidents exercise substantial authority not only through supervision of administrative staff but through assignment of cases to court panels, through participation on intergovernmental committees designated to select other judges, through supervision of other judges in case of ethics complaints, and through having a public megaphone as the most visible representatives of their courts. For general discussion, see Adam Blisa & David Kosaf, Court Presidents: The Missing Piece in the Puzzle of Judicial Governance, 19 German Law Journal 2031 (2018); J. Clifford Wallace, *Comparative Perspectives on the Office of Chief Justice*, 38 Cornell International Law Journal 219 (5, 2005).

109 Institute of Internal Auditors, *Internal Auditing's Role in Corporate Governance* (Institute of Internal Auditors 2018) <https://na.theiia.org/about-ia/PublicDocuments/Internal-Auditings-Role-in-Corporate-Governance.pdf>.

110 See: 17 C.F.R. § 240.10A-3(b)(1).

111 On the public prosecutor's vast powers in general, see Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 Washington & Lee Law Review 1361 (2010). In Cassation in particular, the powers of the prosecutor include, *inter alia*, to appear at will in hearings, to refer decisions to the court for quashing “in the interests of the law,” to request the court sit in plenary session, or a special “mixed division,” to sit on the Bureau which advises the Court President on court administration, and to sit on the Commission for the Promotion of Judges. Cour de Cassation, *About the Court*, Cour de Cassation, [https://www.courdecassation.fr/about\\_the\\_court\\_9256.html](https://www.courdecassation.fr/about_the_court_9256.html). Generally, there has been some skepticism about the extent to which these kinds of powerful internal advocates are compatible with judicial neutrality and procedural fairness. See, e.g., Michal Bobek, *A Fourth in the Court: Why Are There Advocates General in the Court of Justice?*, 14 Cambridge Yearbook of European Legal Studies 529, 532–33 (2012) (recounting ECtHR rulings that internal advocates in Belgium, France, the Netherlands and Portugal violated human rights standards). However, it has also been argued that such advocates have the capacity to promote decision quality by forcing judges to engage with careful advocacy as well as potentially represent public or civil society interests. See Nicholas AJ Croquet, *The European Court of Human Rights' Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension*, 17 Columbia Journal of European Law 307, 368–69 (2011) (arguing for introduction of an advocate-general in ECtHR).

112 Taken from the website of the law firm of Vincent Berger, jurisconsult from 2016-2013; <http://www.berger-avocat.eu/en/ECtHR/jurisconsult.html>

cases much like the junior board member model, and individual assistants to specific judges.<sup>113</sup>

## 4.2 Board Member Workload

Time-burdened board members are forced to concede more responsibility (control) to staff or accept lower decision quality. There are at least three high-level variables relative to time management:

1. Number of cases or other matters for decision.
2. Number of board-member-hours available.
3. Number of board-member-hours required to decide a case.

Once again, choices among these options seem to cluster into several discrete families.

Some boards, particularly among courts in the European model as well as intermediate appellate courts in the United States, are oriented toward high-volume case processing, considering hundreds or thousands of cases yearly. The primary strategies adopted to manage the workloads of these boards include:

- Expansion of the number of board members and the creation of many small sub-panels to hear cases, with the possible tradeoffs of (a) reducing outcome consistency between cases,<sup>114</sup> and (b) conferring disproportionate influence over outcomes to those who set panel assignments (often Court Presidents and the like); and
- Summary disposition of cases, either by enforcing formal admissibility standards (either by single board members or by staff), or by producing summary rulings in easy cases, with the possible tradeoff of conferring disproportionate influence over outcomes to those who make summary decisions. Concerns have also been raised that summary disposition procedures may sacrifice outcome accuracy and procedural fairness.<sup>115</sup>
- A reduction of board member labor allocated to all cases, potentially by limiting inputs (such as constraining the evidence or argument allowed to petitioners), but particularly by limiting outputs. Output limitation strategies include producing brief decisions with minimal reasoning, such as in the French Court of Cassation and the European Court of Justice “ECJ”, and delegating important tasks such as decision-writing to staff, such as in the U.S. courts, and, indirectly, via the Advocate-General in the ECJ.<sup>116</sup>

113 Elaine Mak, *Case Selection in the Supreme Court of the Netherlands Inspired by Common Law Supreme Courts?*, 21 *European Journal of Current Legal Issues* 18 (2015).

114 See, generally, Rimvydas Norkus, *The Filtering of Appeals to the Supreme Courts (Network of the Presidents of the Supreme Judicial Courts of the European Union Dublin Nov. 26, 2015)* <https://www.lat.lt/data/public/uploads/2018/01/introductory-report-the-filtering-of-appeals-to-supreme-courts-president-rimvydas-norkus.pdf> (describing a hypothetical extreme case of a high-volume Supreme Court and its consequences for outcome predictability and consistency).

115 See, e.g., Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 *Admin. L. Rev.* 647, 674–75 (2008) (noting critiques of streamlined summary disposition process in U.S. Board of Immigration Appeals, in which single-judge summary affirmance plus tight deadlines lead to high error rate); Lize R. Glas, *Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant*, 25 *Maastricht Journal of European and Comparative Law* 607 (2018) (describing “unilateral declarations” process in the ECtHR and worries about the potential insufficient protection it may provide to the interests of complainants); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 *U. Mich. J.L. Reform* 623 (1988) (describing worries going back to 1980’s about procedural fairness implications of U.S. Court of Appeal workload management strategies). See also European Court of Human Rights press release, “Launch of new system for single judge decisions with more detailed reasoning” <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5735020-7285664&filename=Launch%20of%20new%20system%20for%20single%20judge%20decisions%20with%20more%20detailed%20reasoning.pdf> (describing change in procedure in summary single-judge dismissals of cases to provide more detailed explanations to complainant in light of court’s success in dealing with backlog).

116 Even in cases that receive a full rather than summary hearing, U.S. law clerks often play a substantial role in opinion drafting, which has been criticized by some scholars and judges. For example, See, e.g., Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 *Hofstra Law Review* 1095, 1100 (2004) (identifying as ethically suspect U.S. judges who fail to seriously supervise opinions written by clerks).

Some boards, most prominently the U.S. Supreme Court, manage their workload by exercising a strong pre-screening process, limiting their consideration to particularly important cases. Case-selection processes are further reviewed below, however, it should be preliminarily noted that the primary trade-off from this institutional choice is that many individuals whose cases might benefit from board review (in terms of increased likelihood of achieving an accurate resolution as well as independent virtues of voice and participation) are sacrificed in this context.

Workload management is particularly salient in part-time boards, such as in the Inter-American human rights system as well as in corporate boards, police civilian complaint review boards and other advisory boards. In many of those contexts, the part-time nature of such boards may be a significant limitation on their institutional capacity.<sup>117</sup>

### 4.3 Board Member Selection

The abstract-level qualifications for board members are broadly shared across the models considered in this report. At the highest level, those qualifications include:

- *Competence*: board members are typically required to reliably apply governing rules in order to achieve accurate outcomes;
- *Status*: board members are typically required to be able to command the respect of staff, the organization over which they exercise oversight, and persons appearing before them, in order to retain credibility and authority for their decisions as well as to maintain their independence;<sup>118</sup>
- *Representativeness and Neutrality*: board members are typically required to be acceptable to a broad and diverse array of constituents and interest groups, which, depending on the institutional context, may be achieved either by selection processes that attempt to achieve neutrality among such groups, or by processes that attempt to guarantee that all such groups are represented on the board;<sup>119</sup> and
- *Commitment*: board members are typically required to be both diligent and faithful to their tasks, not inserting their personal preferences or agendas into the decision-making process.

There are, however, internal tensions among these virtues. For example, representative boards may lack status and competence, to the extent that representation is achieved by nomination by stakeholders who lack a commitment to the goals of the board; high-status board members may be less willing to keep their own agendas out of their decisions. Different methods of board selection tend to prioritize different combinations of these virtues.<sup>120</sup>

117 See, e.g., F. Todd DeZoort et al., *Audit Committee Effectiveness: A Synthesis of the Empirical Audit Committee Literature*, 21 *Journal of Accounting Literature* 38, 62–65 (2002) (citing studies identifying a positive association between frequency of corporate audit committee meetings and a indicators of effectiveness such as the quality of financial reports). Shelton, *supra* note 84 describes the part-time nature of the Inter-American Commission as a major limitation on its abilities.

118 See, generally, Klein & Morrisroe, *supra* note 24; Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 *Columbia Journal of Transnational Law* 451 (2009).

119 Conceptually, we may see representativeness as lending a kind of collective neutrality. Consider, for example, a fairly typical process for appointing arbitrators in which each party appoints one arbitrator, who in turn appoints a third. While the party-appointed arbitrators are unlikely to be *individually* neutral, the aim of such an institutional design is that if it works, the third arbitrator will be individually neutral, and the panel as a whole will be collectively neutral because the biases of the party-appointed arbitrators will counteract one another when the votes are counted up. Cf. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 *Washington & Lee Law Review* 405 (2000); Jr. Wynn James Andrew & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 *Albany Law Review* 775 (2004) (making similar points).

120 For an alternate typology of desirable qualities and methods of appointment, see Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 *Case Western Reserve Law Review* 409 (1981). See also Lawrence B. Solum, *Judicial Selection: Ideology versus Character*, 26 *Cardozo Law Review* 659 (2005) (giving a list of personal virtues in the judicial context, which include intelligence, courage, temperance [non-corruption], and temperamental stability).



Selection by stakeholders is common in arbitration as well as in international courts such as the European Court of Human Rights (in which initial slates of judges are nominated by states, then confirmed by the Council of Europe) as well as in some community-based entities such as civilian police review boards (which may contain representatives appointed by the police and by advocacy organizations).<sup>121</sup> This selection method prioritizes representation of diverse stakeholders, however, at the possible cost of competence and commitment.<sup>122</sup> Some organizations have established a multi-stage process to ameliorate these concerns, according to which potential board members are first nominated by stakeholders, and then screened by a central committee for competence.<sup>123</sup> Others have adopted something like the reverse, where a nominating committee or other central organization creates a short list of potential nominees, from which stakeholders either choose the ultimate nominees or exercise a veto power over unacceptable candidates.<sup>124</sup>

Stakeholder selection processes are typically associated with organizations where there are a discrete number of readily identifiable stakeholders—for example, the stakeholders in an arbitration often are seen as just the parties themselves; the stakeholders in an international court often are seen as just the signatories to the treaty.<sup>125</sup> Another example of such a process is the Swedish Press Council, whose members are appointed by the National Press Club, the Swedish Union of Journalists, the Newspaper Publishers Association the Magazine Publishers Association, the Chief Parliamentary Ombudsman and the Chairman of the Swedish Bar Association.<sup>126</sup> Such processes may be less appropriate in cases where the board lacks a clearly defined closed set of constituents, as those who are left out are likely to complain of their lack of representation.<sup>127</sup>

A variation on selection by stakeholders is *selection by representative institutions*. In some cases, this selection process is fairly independent from individual stakeholders such as U.S. judicial nominees, in which the only stakeholders who have any particular influence are the U.S. President and powerful Senators), in others informal norms have arisen such that stakeholders effectively have nomination authority on a representative basis<sup>128</sup> or veto power on unacceptable nominations associated with their interest groups.<sup>129</sup> In addition, there are hybrid representative-selection processes according to which central representative institutions select members by consensus, thus ensuring that they are acceptable to all stakeholders (such as with the World Trade Organization Appellate Body). Key concerns raised with this method of selection focus on the politicization of board nominations and consequent threats to neutrality, with the U.S. Supreme Court being the most salient example of a case where the underlying politics of the representative institutions have famously leaked into the oversight institution itself.<sup>130</sup>

121 Ofer, *supra* note 40.

122 See Erik Voeten, *The Politics of International Judicial Appointments*, 9 Chicago Journal of International Law 387 (3, 2009) on patronage appointments to international courts.

123 For example, The European Court of Justice nomination process includes a panel of experts to advise on the appointments process, pursuant to Article 255 of the Treaty on the Functioning of the European Union, and the European Court of Human Rights process in 2010 interposed an expert panel between state nominations and the ultimate appointments process to screen candidates for their qualifications. Council of Europe Parliamentary Assembly Committee on the Election of Judges to the European Court of Human Rights, (2019, April 11). Procedure for electing judges to the European Court of Human Rights: Information document prepared by the Secretariat” AS/Cdh/Inf (2019) 01 rev 2, available at <http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e>

124 See, e.g., Iowa Constitution Article V, Section 15, which provides for a judicial nomination commission to provide a list of appointees to the state governor

125 However, these cases may nonetheless be controversial—third parties may have a stake in arbitration outcomes, for example, and ordinary citizens or non-signatories may have a stake in international adjudications.

126 Allmänhetens Pressombudsman (2019). Charter of the Press Council, available at: <https://po.se/about-the-press-ombudsman-and-press-council/charter-of-the-press-council/>

127 See, e.g., Ofer, *supra* note 40 (advocating for community organization appointment rather than mayoral/police appointment of civilian police review board members).

128 For example, the ECJ’s nomination process, at least in the past, has been described as ostensibly by common consent of the relevant governments, but in reality, “the nominees presented by each Government are in fact endorsed by the Council of Ministers without any real discussion.” M. Gilbert Guillaume, quoted in a speech of Lord Mance of the U.K. Supreme Court at the United Kingdom Association for European Law, October 19, 2011, [https://www.supremecourt.uk/docs/speech\\_111019.pdf](https://www.supremecourt.uk/docs/speech_111019.pdf)

129 One example of the latter is the “blue slip” power traditionally exercised by U.S. Senators, who have had an informal veto over judicial nominees from their home state. Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 William & Mary Bill of Rights Journal 75 (2001).

130 For one of the many efforts to explain the American politicization of the judicial appointments process, see Ferejohn, *supra* note 75.

*Selection by the organization.* Oversight boards closely associated with specific organizations sometimes select their oversight boards internally. This obviously raises the risk of lack of neutrality, representativeness, and commitment to externally imposed regulations. Thus, regulators have responded by imposing constraints on the qualities that such board members may have, in order to protect those interests.<sup>131</sup> However, organization selection may allow the organization to effectively screen for competence and commitment to the organization's rules. A variation on organizational selection is *selection by established career ladder*. Some boards have an ordinary process of career progression according to which a candidate board member passes through lower level boards and other roles in an organization's oversight/dispute-resolution function before progressing to the highest oversight boards via a civil-service-style promotion process.<sup>132</sup>

*Selection by outside experts.* Many U.S. states select their judges by "judicial commissions" that include, for example, representation by the local lawyers and existing/prior judges to ensure that their specialized knowledge is put to work in the selection process. Some international courts also make use of screening commissions to attempt to provide a check on the quality of nominated members.<sup>133</sup> Many European and Latin American courts have adopted "judicial councils" comprised either wholly or partially of judges which select members, and may also be responsible for related matters such as the discipline of judges who violate codes of ethics.<sup>134</sup> This process is designed to promote competence in board members, but does so at the risk of replicating the biases of those who are doing the selection. Judicial commission selection processes in the U.S., for example, have been criticized by conservatives on the grounds that lawyers tend to be more left-wing than the general population, and hence are likely to pick more left-wing judges.<sup>135</sup>

### *Substantive criteria for board member selection*

Some substantive criteria for board members are common across contexts, for example requirements of formal qualifications in the relevant decisional domain---such as financial expertise for corporate audit board members, or legal training and experience for high court judges.<sup>136</sup> In addition, diversity and representativeness are required in a number of boards, such as requirements of gender diversity in many European constitutional courts.<sup>137</sup> In the U.S. context, a number of federal regulatory agencies that exercise oversight-board-like functions, such as the Federal Communications Commission and the Securities and Exchange Commission, are required by law to be balanced with respect to political party membership.<sup>138</sup>

Diversity requirements, particularly with respect to groups who are underrepresented in decision-making institutions, have been extensively studied in the corporate context, where there is a large literature debating the extent to which

131 For example, U.S. corporate audit board members are required to meet certain criteria of financial independence from the company. Conceptually, this may be understood as a faithfulness or neutrality provision, attempting to guarantee that audit members are not biased in favor of management in exercising their judgment, or that they are motivated by the rules they must follow rather than, for example, their personal financial interests. Corporate audit committees must be nominated by independent board members, and there is research suggesting that, in periods prior to this regulatory requirement, audit committees with selection processes involving management were less effective. Joseph V. Carcello et al., *CEO Involvement in Selecting Board Members, Audit Committee Effectiveness, and Restatements*, 28 *Contemporary Accounting Research* 396 (2011).

132 With respect to courts, Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 *The University of Chicago Law School Roundtable* 205 (2000) distinguishes between the "career judiciary" in the civil law courts of Europe, at which a person joins the bench early in his or her career and progresses up the hierarchy, with the "reputation judiciary" in the Anglo-American common law courts, where judges join the bench after careers in practice or academia.

133 For example, the Council of Europe maintains an Advisory Panel to serve as an intermediate step between the nomination of candidates for the European Court of Human Rights by countries and their acceptance by the Parliamentary Assembly. See description of the Advisory Panel at <https://www.coe.int/en/web/dlapil/advisory-panel>. For a description of the process in general, see Parliamentary Assembly. 2014. Election of Judges to the European Court of Human Rights, available at: <http://website-pace.net/web/as-cdh>.

134 Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 *American Journal of Comparative Law* 103 (2009) discuss judicial councils in Europe and Latin America as well as U.S. judicial commissions.

135 Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 *Missouri Law Review* 675 (2009).

136 See Epstein et al., *supra* note 85, at 17–20 (comparing formal qualifications of European constitutional court judges).

137 Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 110 *American Journal of International Law* 82, 83 (2016) (listing courts with gender-representation requirements).

138 Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 *Columbia Law Review* 9 (2018).

there is a measurable effect of corporate board diversity on financial performance.<sup>139</sup> In addition to decision quality benefits, diversity may support external (sociological) legitimacy: members of the public from diverse backgrounds may be more willing to see the actions of diverse boards as fair.<sup>140</sup>

Scholars have also argued that people of underrepresented and socially excluded groups have a moral right to participate in important decision-making boards, particularly judiciaries, for example, as a way of redressing social exclusion or ensuring broad-based democratic (normative) legitimacy for those boards.<sup>141</sup> Moreover, scholars and jurists have argued that diverse board members are more culturally competent, in the sense of being more able to understand diverse styles of communication and forms of information.<sup>142</sup> Diverse decision-making bodies may be better able to produce unbiased decisions on an individual case-by-case basis, because non-diverse/unrepresentative bodies may produce decisions unduly influenced by the ideas and perceptions of dominant group members.<sup>143</sup>

## 4.4 Decisional and Process Transparency

Boards vary in the degree in which they communicate information about their decisions to a broader public. At the extreme noncommunicative pole is arbitration, in which arguments and evidence are often confidential, and outcomes themselves may be secret.<sup>144</sup> At the other extreme are judicial outcomes in a court such as the United States Supreme Court, where argument and evidence are almost entirely public, and the court issues opinions signed on an individual basis by justices which can run to hundreds of pages of detailed reasoning and argument.

Transparency appears to be a function of several variables:

- *Board workload.* Those entities with a larger workload are often simply unable to publish their full reasoning in each case, resorting to gnomic rulings (such as in the French Cassation) or unpublished summary rulings

139 For example, see Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies*, 127 *Journal of Financial Economics* 588 (2018) (providing evidence that corporations with boards that are more diverse on a “multidimensional index” comprised of “gender, age, ethnicity, educational background, financial expertise, and breadth of board experience” take wiser financial risks). See also Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 *Delaware Journal of Corporate Law* 377 (2014) (skeptically evaluating the evidence for a financial benefit from board diversity); James A. Fanto et al., *Justifying Board Diversity*, 89 *North Carolina Law Review* 901, 934 (2011) (arguing that advocates of board diversity should not focus on ostensibly dubious financial benefits, but on broader decisional benefits relating to social objectives such as “alter[ing] the dominant, finance-based, social identity that now characterizes public company boards”). For the general theoretical basis for a relationship between diversity and decision improvements, see, e.g., Scott E. Page, *Where Diversity Comes from and Why It Matters?*, 44 *European Journal of Social Psychology* 267 (2014). The decisional benefits of diversity may depend on representation by a “critical mass” of underrepresented group members. See Paul M. Collins Jr et al., *Gender, Critical Mass, and Judicial Decision Making*, 32 *Law & Policy* 260 (2010), who provide some empirical support for a theory of critical mass according to which isolated members of minority groups conform to majority views until they reach a sufficient concentration within a decision-making body to receive social support for divergence, and Jasmin Joecks et al., *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a “Critical Mass?”*, 118 *Journal of Business Ethics* 61 (2013), who find evidence of financial performance increasing in corporate boards with a critical mass of approximately 30% women.

140 See, e.g., Ming W. Chin, *Fairness or Bias: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 *Asian-American Law Journal* 181 (1997) (attributing public perception of racial bias in California judiciary to its lack of racial diversity); Luis Fuentes-Rohwer & Kevin R. Johnson, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 *Michigan Journal of Race & Law* 5, 10 (2004) (arguing that diverse judges “improve public perception of the impartiality of judicial decision-making”). Jessica E. Sowa & Sally Coleman Selden, *Administrative Discretion and Active Representation: An Expansion of the Theory of Representative Bureaucracy*, 63 *Public Administration Review* 700, 701–2 (2003) describe this as “the symbolic importance of passive representation.”

141 See, e.g., Richard Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a Triple P Judiciary*, 38 *Alberta Law Review* 734 (2000).

142 See, e.g., Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 *Asian-American Law Journal* 127, 134–37 (2003) (detailing ways in which the distinctive experiences of nonwhite American judges have enhanced judicial decision-making, such as in weighing the credibility of claims of racial bias and in understanding the meaning of nondominant forms of social interaction). See also Ifill, *supra* note 119; Fuentes-Rohwer & Johnson, *supra* note 140 (similar).

143 Wynn & Mazur, *supra* note 119, at 785 describe the property of a diverse judiciary that can offer fair decisions to all in virtue of its diversity as “structural impartiality.” See also Ifill, *supra* note 119.

144 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 *North Carolina Law Review* 679 (2018).

produced by staff in many cases (as with the intermediate U.S. Courts of Appeals).<sup>145</sup>

- *The desire (or lack thereof) to generate precedent.* Boards that are oriented toward simply resolving matters before them on a one-off basis have less incentive to fully explain their decisions in order to guide future cases. The distrust of judicial lawmaking has been cited as a major factor in the minimal decisions of the French courts.<sup>146</sup> Moreover, a strong desire to generate precedent may also press boards to inflate their reasoning by generating rulings on matters not brought before them or critical to the result.<sup>147</sup>
- *The sensitivity of the information leading to a decision relative to the public stake in it.* The relative non-transparency of commercial boards, such as arbitrators and the World Trade Organization Appellate Body, as well as national security entities such as the United States Foreign Intelligence Surveillance Court, is often justified by the need to preserve confidentiality of information submitted to them.<sup>148</sup>

## 4.5 Downstream Effects of Decisions

The downstream effects of board decisions vary along several dimensions:

- *Degree of Formal Authority Over Policy Versus Individual Cases:* some boards set or recommend overall policy for an organization. For example, some civilian police review boards may recommend organizational reforms to policing practices.<sup>149</sup> Others are focused on resolving specific disputes in specific cases, as in investigative boards. Some categories of board set policy by resolving specific cases; this is characteristic of the Anglo-American common law method of legal adjudication, in which courts declare new rules of law in the course of resolving individual disputes.
- *Degree of Oversight Hierarchy:* some boards, particularly appellate courts, sit atop an oversight hierarchy such that lower-ranking bodies are *de facto* obliged to decide cases in accordance with the reasoning of the higher-ranking body in order to avoid subsequent reversal of their decisions, even if there is no formal rule requiring them to do so. The same organizational constraint sometimes applies to boards that supervise administrative organizations which recurrently consider similar problems: an administrative organization that wishes to economize on decision-making effort has an incentive to conform its decisions to the rulings of an oversight board that has the capacity to reverse those decisions.<sup>150</sup>
- *Degree of Communicative Capacity:* in addition to formal policymaking authority, many boards exercise influence over the long-term development of policy by communicating their reasoning to other decisionmakers or to the public at large; boards that are more transparent or communicative, and those that

145 On the Courts of Appeals, see Pether, *supra* note 94; Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 The Georgetown Law Journal 683 (2018).

146 See Lasser, *supra* note 69, at 1006.

147 For example, the U.S. courts have been criticized for creating unnecessary precedent with “dicta,” statements of law that are not necessary to resolve the case before them. See, e.g., Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 New York University Law Review 1249 (2006).

148 Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 Cornell International Law Journal 1 (2009); Stefano Azzali, *Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome*, Transnational Notes (Dec. 28, 2012), <https://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/>.

149 Peter Finn, *Citizen Review of Police: Approaches and Implementation*, NCJ 184430 (U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice 2001) 6.

150 Some organizations resolve this dilemma by maintaining an ultimate rulemaking authority that controls both the administrative and the oversight function. For example, while appellate boards in U.S. administrative agencies may effectively set policy by reversing administrative decisions contrary to their perception of correct policies, the heads of those agencies exercise overall supervisory authority over both the boards and the administrative organization, and hence may reset policy on their own initiative. See, e.g. Eyer, *supra* note 115, at 669–71 (describing Attorney General’s use of regulatory power to create and set limits to Board of Immigration Appeals authority, review cases, and change procedures).

have higher status with listeners who hold influence over the policy process, can be expected to exercise more influence over downstream policy outcomes.<sup>151</sup>

- *Degree to Which Underlying Rules Are Partially Specified*: a board may operate on the basis of detailed rules which cover more situations which it must decide unambiguously, or it may operate on the basis of broad statements of policy and principle which may require it to develop interpretive rulings in order to ensure consistency on a case-by-case basis.
- *Degree to Which Membership is Stable*. Stable membership boards may develop consistent principles according to which they operate over time, and may be particularly motivated to be individually consistent (for example, so as to not appear to be biased, arbitrary, or hypocritical).

In view of these factors, boards which are not formally vested with the authority to create binding precedent often accrete informal precedent-setting power: board members tend to be motivated to act consistently across cases, and hence have an incentive to reference their own prior decisions; those who appear before them (such as litigants in courts) similarly have an incentive to do so, and to shape their behavior in anticipation of consistent decisions (thus acting as if those boards have the power to set formal rules).<sup>152</sup> For example, the French Court of Cassation is embedded in a cultural and legal context in which statutes are the only official source of law and judicial lawmaking is deeply distrusted. Moreover, it issues famously short rulings that disclose little of the internal debates or detailed reasoning on which its decisions are based. Nonetheless, even that court has generated unofficial precedent that influences subsequent results.<sup>153</sup>

Those boards which do not have any informal precedent-setting power are probably limited to ad hoc arbitral bodies that do not disclose their inputs or their outputs beyond the parties. Such boards are unlikely to have precedent-setting power simply because they lack institutional memory: without consistency of membership or any kind of publication of facts or outcomes, there is no knowledge of prior cases to influence subsequent cases. Such dispute resolution processes have been criticized by scholars for just this feature, as the capacity to formally or informally set precedent may promote the evolution of underlying rules as well as knowledge by those who are subject to those rules about how their behavior will be evaluated.<sup>154</sup> However, even in such contexts, there may be some minimal institutional knowledge, and hence informal precedent, created in the form of information transmitted by repeat players: a union and an employer who maintain their own records of arbitration facts and outcomes, for example, may have the resources to offer consistency-based arguments to new arbitration panels.<sup>155</sup>

## 4.6 Case Selection and Assignment

As noted above, the selection process for cases, as well as the process for channeling cases to, for example, expedited review, smaller or larger panels, and the like, has significant implications both for the exercise of power within a board as well as for the quality and consistency of decisions and the extent to which users and the community at large genuinely perceive

151 Reputation or status can be associated with the board as a whole or its individual members. Garoupa & Ginsburg, *supra* note 118. On prestige and the influence of precedent, see Klein & Morrisroe, *supra* note 24.

152 See, generally Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 International Review of Law and Economics 519, 521–23 (2006) (describing civil law notion of jurisprudence constante, or the following of consistent bodies of precedent as persuasive authority in the absence of formal case-by-case stare decisis); Margaret McCown, *The European Parliament before the Bench: ECJ Precedent and EP Litigation Strategies*, 10 Journal of European Public Policy 974 (2003) (describing informal influence of ECJ precedents on arguments of litigants and judges).

153 See Lasser, *supra* note 69.

154 Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Washington University Law Review 637, 695 (1996) discusses this argument in some detail.

155 On precedent in arbitration, see generally W. Mark C. Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. Rev. 1091 (2012) (empirical study finding evidence that U.S. arbitration awards frequently cite judicial precedent but very rarely cite arbitral precedent).

themselves to have access to a fair process for seeking reconsideration of internal decisions. Sub-questions include:

## What are the criteria for selecting cases?

- Some bodies use *merits-based criteria*, such as the likelihood of success in an ultimate adjudication. However, merits-based criteria require someone to make a preliminary determination as to the strength of the appeal, and many vest substantial power in that person (or group). This may be reduced in high-volume boards in which case selection is simply based on procedural considerations, such as a disputant having exhausted all other avenues for review.
- Some bodies use *learning-based criteria*, i.e., they select cases for the purpose of improving the system of rules as a whole, for example, to make precedent in order to clarify an underlying rule, to reconcile inconsistent past decisions of lower bodies, provide feedback to rule makers, or to resolve an important or recurring issue. (This is the process of the U.S. Supreme Court.)

## Who does the selecting and assignment?

There is some evidence that the personnel who select cases and (in some systems) who assign cases to different subpanels or to expedited vs full processes (or to summary disposition) have the capacity to exercise a disproportionate amount of power over outcomes.<sup>156</sup> This can be ameliorated by creating second-stage processes where the full board or larger subpanels can review screening or assignment decisions, but only at the cost of institutional complexity and additional burden on disputants.

High-capacity/low-volume courts like the U.S. Supreme Court (“SCOTUS”) can make these determinations themselves in a unified fashion (such as the SCOTUS process for granting certiorari if any four justices agree). But lower capacity or higher volume courts typically allocate them to one of the following:

- Staff (leading to the undue influence concerns noted above);
- Fixed subgroups of the board (such as a “President of the Court” and other senior staff);
- Rotating subgroups of the board; or
- Some parallel/junior board (such as the Inter-American Commission on Human Rights, which filters cases for the Inter-American Court).

Some boards have adopted hybrid procedures. For example, the Dutch Hoge Raad has a procedure according to which an Advocate-General reviews a case and recommends dismissal of inadmissible cases, a recommendation to which an appellant may respond, leading to an ultimate decision of admissibility by a panel of the court.<sup>157</sup>

Another helpful typology is set out in a conference presentation by Rimvydas Norkus, the President of the Lithuanian Supreme Court.<sup>158</sup> According to Norkus, European Supreme Court case selection procedures fall into three basic categories, as well as hybrid models among them:

1. The “leave-to-appeal” system, in which cases are heavily filtered with selection “on the basis of quite abstract criteria” such as the importance of the case in terms of resolving significant legal disputes, typically by the court itself, a sub-panel of that court, the court below, or some body consisting of members of both the court itself and lower courts;

<sup>156</sup> See, e.g., Pether, *supra* note 94; Shelton, *supra* note 84.

<sup>157</sup> Mak, *supra* note 113.

<sup>158</sup> Norkus, *supra* note 114, at 11–12.

2. The “no judicial filtration” system, in which courts manage their workload by informally recruiting the assistance of third parties, such as the bar (i.e., by relying on lawyers to advise their clients about the futility of an appeal),
3. A “disguised leave to appeal” system in which courts manage their docket after the fact by exercising robust authority to handle cases by summary disposition after they have already landed on its docket.

Some systems also include privileged internal processes for referring cases to the board as a separate track in addition to outside appeal, such as to the capacity of the French Public Prosecutor to refer cases to Cassation.

Finally, there is at least one oversight board that claims the authority to conduct random reviews of cases even in an adjudicative context. The implementing regulations of the U.S. Social Security Administration Appeals Council provides that it will use random sampling to identify cases from lower levels that may be reviewed on its own initiative, as well as “selective sampling” “to identify cases that exhibit problematic issues or fact patterns that increase the likelihood of error” for review.<sup>159</sup> This process may serve as a useful supplementary check on systematic errors or biases in selection of cases for review by other means.<sup>160</sup>

## 4.7 Guaranteeing Effective Information

All board models require some access to reliable and complete information relevant to decisions. Several dimensions of variation in how that information is accessed may be gleaned from the reviewed models:

- Some boards are *embedded in the existing administrative structure of the organization under review*, or have assistance from staff who are thus embedded. Examples are corporate audit committees with authority over internal audit functions within the management hierarchy, Inspector General offices, and potentially some kinds of administrative adjudicators.<sup>161</sup> Such boards may have privileged access to organizational information, such as the capacity to directly pull decision files, but may not have as strong a degree of access to information from third parties.
- Some boards have *coercive process to obtain information*, ranging from soft processes by which information which is not provided may be used to warrant inferences against the party failing to provide that information, to hard processes (typically associated with national courts) in which boards may directly impose monetary or other sanctions on parties who fail to provide information sought, for example, by subpoena.
- Some boards (particularly in the investigative family, such as Ombuds and some Civilian Review Boards) have *staff support to conduct independent investigations* on their own initiative.
- Some boards *rely primary on voluntary submission from adversarial parties* to receive decision-relevant information, though this may be appropriate only when the parties are on an equal footing to acquire information in the first place.<sup>162</sup> All boards permit parties to a dispute to submit some information, and in addition to preserving information quality, the capacity for parties to submit information to the board is a core element of procedural fairness.

<sup>159</sup> 20 C.F.R. 404.969(b).

<sup>160</sup> Of note with respect to the next section, this procedure also implies that the Appeals Council has some degree of privileged access to records of decisions at lower levels.

<sup>161</sup> See, e.g., Inspector General Act of 1978, 5 U.S.C. App. 6(a)(1) (providing broad informational access to U.S. government Inspector Generals)

<sup>162</sup> See, e.g., WTO Agreement Annex 2, “Understanding on rules and procedures governing the settlement of disputes,” Article 13 (specifying process for WTO dispute settlement panels to seek information from parties without any obvious process for compelling provision of that information).

- Formal courts develop detailed rules on *admissibility of evidence and burdens of proof and persuasion* which may not be present in less informal methods of dispute resolution such as those in the arbitral family.

## 5. Conclusions

This analysis helps highlight the range of different institutional systems and models – or, as we have termed them, ‘families’ – that aim to provide external oversight and accountability as a balance to deliberative decision-making processes. Ultimately the findings of this research serve more as a starting point to inform and develop a base of critical consumers of oversight in the context of social media and internet-mediated communication and services. Our aim was to build an initial body of knowledge that could be use in assessing both oversight board and future regulatory approaches.

In that context, comparing these different families yields three key take-aways. *First*, that despite their differences, these families operate on a similar framework where a combination of design and execution decisions are key inputs into a process which yields two key outputs: fair and accurate decisions that are operationally feasible. Such a model then can yield legitimacy when combined with the additional elements of transparency and timely execution of outputs (i.e. the oversight body’s recommendation or advice). *Second*, within this common framework, the families must trade-off key process dimensions such as autonomy of the board with validity or salience of information with procedural fairness. Such trade-offs highlight that despite a common goal, these different families have different priorities and ultimately serve different functions. Finally, there is no ‘silver bullet’ for institutional design that will address all issues for all constituencies in all conditions. In the context of a governance for social media – a largely new and rapidly evolving space – it is worth considering the underly priorities and values of external oversight in assessing and ultimately resolving trade-offs in these process dimensions. Enhancing external awareness about trade-offs in design and execution decisions and clearly communicating final decisions is in some senses more critical than the specific decisions themselves.



## Sample photos from Oversight Board workshops and roundtables



### TOP & BOTTOM

Public Town Hall - Norman, Oklahoma. Photo credit: University of Oklahoma College of Law



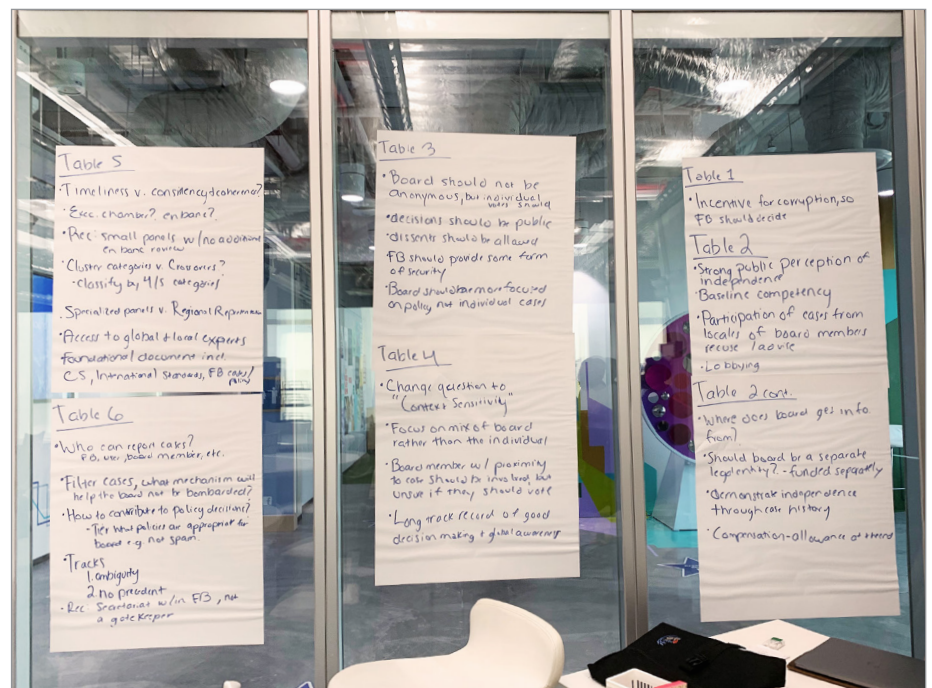


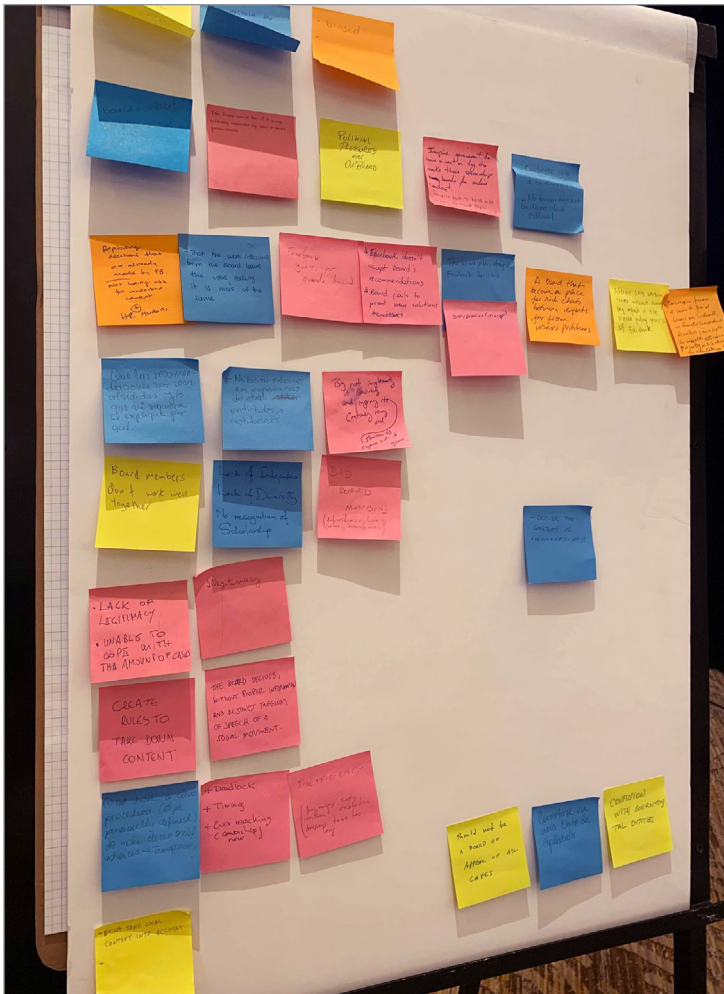
## BOTTOM

Brainstorming from Singapore workshop. Photo credit: Facebook

## TOP

Discussion boards from Berlin workshop. Photo credit: Facebook



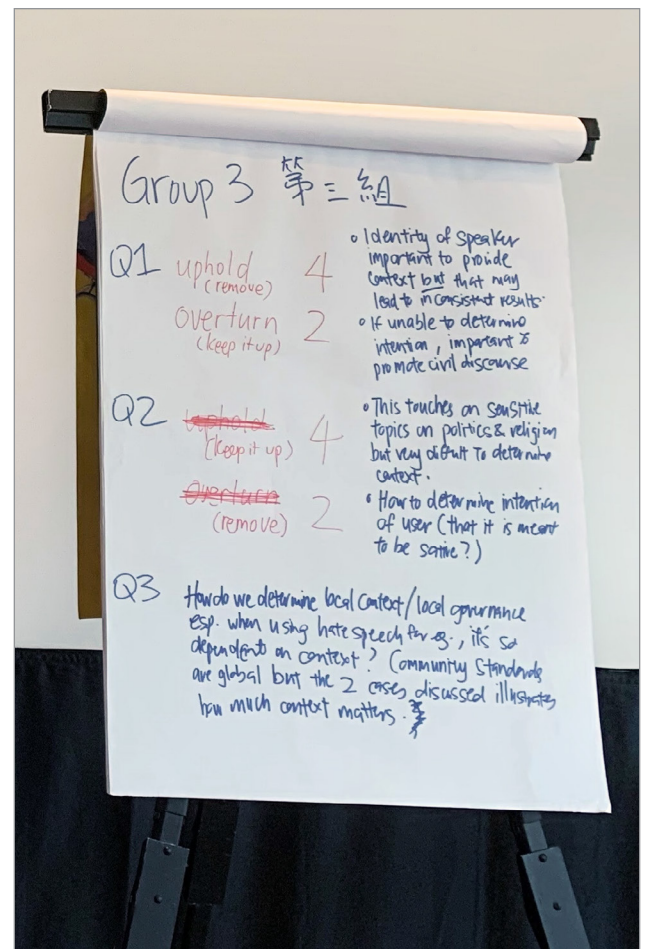


## BOTTOM

Icebreaker exercise from Mexico City workshop. Photo credit: Facebook

## TOP

Brainstorming from Taiwan roundtable. Photo credit: Facebook





## How can we support and ensure transparent and independent judgment by the board?

Comment pouvons-nous soutenir et garantir un jugement transparent et indépendant de la part du conseil?

### Suggested Discussion Points:

- Sources of influence
- Relationship with Facebook
- Impartiality
- Conflicts of interest
- Compensation

### Points de discussion suggérés:

- Sources d'influence
- Relation avec Facebook
- Impartialité
- Les conflits d'intérêts
- Compensation

### R1 - transparent process for establishing board

#### Financial Disclosure for Board Members

- by conflicts of interest
- board member selection: guidelines + criteria (cleaned)
- No political politicians!! civil servants
- Vetting for political + economic conflicts
- Process for removal
- Removal process: No removal by FB w/o cause
- Board members can remove for disciplinary reason
- ethics panel / ombudsman (joint FB + Board)
- Reporting, public → demonstrate decisions with clarity
- MoE, KPI's
- Multi-year funding - 10 years? 9 or 12 years
- term limits → staggered

### R2 (6)

#### Nomination committee

- Special purpose vehicle to establish the board or the board becomes the SPV which transitions with legal backing
- Trust fund to compensate the board and fund SPV
- A requirement of declaration of conflict of interest

### R3

- des garanties textuelles d'indépendance, d'impartialité et de neutralité
- l'impossibilité de révoquer les membres sauf en cas de faute lourde d'un membre
- transparence dans la gestion budgétaire
- accès à l'information non confidentielle
- révélabilité envers la communauté
- le conseil doit avoir 1 second niveau en son sein
- non-interférence

## How can we support and ensure transparent and independent judgment by the board?

### Suggested Discussion Points:

- Sources of influence
- Relationship with Facebook
- Impartiality
- Conflicts of interest
- Compensation
- Governance

### 4 - Board members should be compensated(?)

- \$100,000/yr
- Why isn't this a full-time job? at charter terms
- Charter - a not profit?
- Launch matters (e.g. 4) - Staged engagement strategy
- Special Procedures mandate holders as a model
- Judgment of Board members by Board members (ethics)
- Facebook shareholder (significant) - conflict
- Part-time = only academics?
- Trust doesn't make substantively matter but it's a shot
- Qualified ppl who understand how FB works
- optimists who think it's worth a shot

### 5 - Compensation TED (not 100,000)

- FB cannot remove board members except for very explicit/transparent violations
- potentially only share final decision, not breakdown by members
- recusal if direct interest
- INTERPENCE: board can dictate # of cases
- Staffing for board should be independent of FB (FB must)
- Staggered terms for institutional knowledge
- Full time roles not part-time
- Privacy/Security of subcommittee/experts
- Access to technical information/invarished info on cases
- Governance (internal appeals system for allocation to full board)
- Bundling cases - no extra ft, impartiality

### 6 - FB cannot remove board members, but members can (vote or other process)

- immediate ethics officer instead of 5-person exec committee
- conflict of interest?
- research partnership? no
- how big is umbrella? no centers (univ except)
- org funded by FB? no maybe (if you leave)
- what is difference btwn prohibited characteristics vs disclosure
- opinions need to be released with explanation
- maybe can have options for subjects being willing for info to be shared
- financial interests made clear, this is full-time job, about transparency
- also about caseload/time

### TOP

Discussion board from Nairobi workshop.  
Photo credit: Facebook

### BOTTOM

Discussion board from New York City workshop.  
Photo credit: Facebook